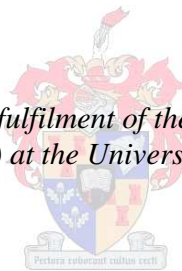


AN ANALYSIS OF SECTION 80A(C)(ii) OF THE INCOME TAX ACT NO. 58 OF 1962 AS AMENDED

by
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*Thesis presented in partial fulfilment of the requirements for the degree
MAcc (Taxation) at the University of Stellenbosch*



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March 2009

DECLARATION

I, the undersigned, declare that the content of this assignment is my own original work and has not been submitted, in part or in its entirety, to any other University to obtain a degree.

.....
B.P. GELDENHUYS

.....
DATE

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AN ANALYSIS OF SECTION 80A(C)(ii) OF THE INCOME TAX ACT NO. 58 OF 1962 AS AMENDED

In November 2006 section 103(1) of the Act was abolished and replaced by a new Part IIA, containing sections 80A to 80L, which targets impermissible tax avoidance arrangements. Section 80A(c)(ii) introduced a new concept to the South African tax law: a misuse or abuse of the provisions of the Act, including Part IIA thereof.

The objective of this study was to establish the origin, meaning, application and effect of section 80A(c)(ii) of the Act. The evolution of section 80A(c)(ii) was therefore examined where after the enacted version was analyzed. It was essential to determine the origin of section 80A(c)(ii) in order to establish some point of reference from which inferences could be drawn as to the possible application and effect thereof. Case law, practice statements and articles relating to its proposed root was then examined.

A 'misuse or abuse' of a provision, it was found, implies, frustrating or exploiting the purpose of the provision. This contention was confirmed by existing Canadian precedent. Such an interpretation, however, has a strong resemblance to the words in which the draft version of section 80A(c)(ii) was couched. It is therefore in contrast to the presumption that different words (in the enacted version) imply a different meaning. The precise meaning of the words 'misuse or abuse' is thus still elusive.

It was established that section 80A(c)(ii) has its roots in section 245 of the Canadian Act. Section 245(4) was regarded as an effective comparative to section 80A(c)(ii) as it also contained a so-called misuse or abuse rule. The application of this rule in the Canadian tax environment required the following process:

- Interpret (contextually and purposively) the provisions relied on by the taxpayer, to determine their object, spirit and purpose.
- Determine whether the transaction frustrates or defeats the object, spirit or purpose of the provisions.

Section 245(4) had the effect of reviving the modern approach (a contextual and/or purposive theory) to the interpretation of statutes in Canada. Reference to the 'spirit' of a provision (above) was found not to extend the modern approach to statutory interpretation: it does not require of the court to look for some inner and spiritual meaning within the legislation. As section 245(4) was regarded as an effective comparative to section 80A(c)(ii) it was contented that it would have a similar effect, than that of its Canadian counterpart, on the approach to statutory interpretation in South Africa.

However, it was established that a modern approach to statutory interpretation was already authoritative in South Africa. This finding led the author to the conclusion that section 80A(c)(ii) could at best only reinforce the case for applying such an approach. Such a purpose for section 80A(c)(ii) was however found to be void in the light of the Constitution of the Republic of South Africa, which was enacted in 1996, and provides a sovereign authority for the application of the modern approach.

It was also found that the practical burden of showing that there was a 'misuse or abuse of the provisions of this Act (including the provisions of this Part)' will rest on the shoulders of the Commissioner, notwithstanding section 82 of the Act.

'N ANALISE VAN ARTIKEL 80A(C)(ii) VAN DIE INKOMSTEBELASTINGWET NO. 58 VAN 1962 SOOS GEWYSIG

Artikel 103(1) van die Inkomstebelastingwet is herroep in November 2006 en vervang deur Deel IIA, bestaande uit artikels 80A tot 80L, wat daarop gemik is om ontoelaatbare belastingvermydingsreëlins te teiken. Artikel 80A(c)(ii) het 'n nuwe konsep in die Suid-Afrikaanse Inkomstebelastingreg ingebring: 'n misbruik of 'n wangebruik van die bepaling van die Wet, insluitende Deel IIA.

Die doel van hierdie studie was om die oorsprong, betekenis, toepassing en uitwerking van artikel 80A(c)(ii) vas te stel. Die ontwikkeling van artikel 80A(c)(ii) is daarom ondersoek waarna die verordende weergawe daarvan geanaliseer is. 'n Sleutelaspek van die analise was om die oorsprong van artikel 80A(c)(ii) vas te stel. Hierdie oefening het 'n verwysbare bron daargestel waarvan afleidings rondom die moontlike toepassing en uitwerking van artikel 80A(c)(ii) gemaak kon word. Hofsake, praktyknotas en artikels rakende die voorgestelde oorsprong is vervolgens ondersoek.

Daar is vasgestel dat 'n 'misbruik of wangebruik' van 'n bepaling neerkom op die frusterende of uitbuiting van die doel van 'n bepaling. Hierdie bewering is bevestig deur bestaande Kanadese presedent. So 'n interpretasie is egter soortgelyk aan die woorde waarin die konsepweergawe van artikel 80A(c)(ii) uitgedruk is. Dit is daarom in teenstelling met die vermoede dat 'n wysiging van die woorde (in die verordende weergawe) 'n gewysigde betekenis impliseer. Die presiese betekenis van die woorde 'misbruik of wangebruik' is dus steeds ontykend.

Daar is bevind dat artikel 80A(c)(ii) waarskynlik sy ontstaan in artikel 245 van die Kanadese Inkomstebelastingwet gehad het. Artikel 245(4) van die Kanadese Inkomstebelastingwet is beskou as 'n effektiewe vergelykende artikel vir artikel 80A(c)(ii), aangesien dit ook oor 'n sogenaamde misbruik of wangebruik reël beskik. Die toepassing van hierdie reël in die Kanadese belastingmilieu vereis die volgende werkswyse:

- Interpreteer (kontekstueel en doeldienend) die bepalings waarop die belastingpligtige steun, ten einde die oogmerk, gees en doel daarvan vas te stel.
- Bepaal of die transaksie, deur die belastingpligtige aangegaan, die oogmerk, gees of doel van die bepalings frustreer.

Artikel 245(4) het aanleiding gegee tot die herstel van die moderne benadering ('n kontekstuele en/of doeldienende teorie) tot die interpretasie van wetgewing in Kanada. Daar is bevind dat die verwysing na die 'gees' van 'n bepaling (hierbo) nie aanleiding gee tot die uitbreiding van die moderne benadering tot wetsuitleg nie: dit vereis nie dat die hof moet soek na die innerlike of geestelike betekenis van die wetgewing nie. Aangesien artikel 245(4) as 'n effektiewe vergelykende artikel vir artikel 80A(c)(ii) beskou is, is daar aangeneem dat dit 'n soortgelyke uitwerking, as sy Kanadese eweknie, op wetsuitleg in Suid Afrika sal hê.

By nadere ondersoek is daar egter bevind dat 'n moderne benadering tot wetsuitleg alreeds gesaghebbend in Suid Afrika is. Hierdie bevinding het die skrywer tot die gevolgtrekking gebring dat artikel 80A(c)(ii), in beginsel, slegs die saak vir die moderne benadering tot wetsuitleg in Suid Afrika sal versterk. Indien hierdie die doel is wat die wetgewer gehad het met die verordening van artikel 80A(c)(ii), sal dit egter niksseggend wees in die lig van die Grondwet van die Republiek van Suid Afrika, wat verorden is in 1996, en 'n oppermagtige gesag bied vir die moderne benadering tot wetsuitleg.

Daar is ook vasgestel dat die onus op die Kommissaris rus om te bewys dat daar 'n 'misbruik of wangebruik van die bepalings van hierdie Wet (waarby ingesluit die bepalings van hierdie Deel)' was, ondanks artikel 82 van die Wet.

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‘The architects of certain tax aggressive structures will not be permitted to abuse South Africa’s tax provisions in ways clearly unintended by the legislature. They will be vigorously challenged.’ ~ Pravin Gordhan, SARS Commissioner.¹

¹ Thersby 2007

CHAPTER 1

Introduction

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1.1 Background and problem statement

In November 2006 section 103(1) of the Income Tax Act No. 58 of 1962, as amended, (the Act) was repealed. A new Part IIA was inserted into the Act by section 36(1)(a) of the Revenue Laws Amendment Act, 2006. Part IIA contains sections 80A to 80L² which targets impermissible tax avoidance arrangements and will apply to any arrangement (including all steps therein or parts thereof) entered into on or after 2 November 2006.

Part IIA attempts to draw a line between permissible and impermissible (or abusive) tax avoidance. Section 80A of the Act contains four requirements in order to determine whether an arrangement is an impermissible tax avoidance arrangement or not. In short, the four requirements are:

1. An avoidance arrangement (as defined) is entered into or carried out;
2. It results in a tax benefit (as defined);
3. Any one of the following 'tainted elements' are present:
 - Abnormality regarding means, manner, rights or obligations;
 - Lack of commercial substance (as defined) in whole or in part;
 - Misuse or abuse of the provisions of this Act (including Part IIA);
4. The sole or main purpose is to obtain a tax benefit.

The misuse or abuse requirement³ is contained in section 80A(c)(ii). The concept of a misuse or abuse of any provision of the Act, has not been

² Sections 80A to 80L of the Act are collectively referred to as the general anti-avoidance rule in South Africa.

³ This will also be referred to as the misuse or abuse concept.

developed in the Act at all. In addition, the words 'misuse' or 'abuse' do not appear with great frequency in our law reports; at least, not when used uniformly in any very specific technical sense.⁴ Broomberg is of opinion that section 80A(c)(ii) introduces a principle that relates more aptly to the law prevailing in foreign jurisdictions, presumably Canada.⁵ According to Mazansky this is an area that will have to be developed by the courts over time, though it is likely to be quite a few years before the first decision is handed down.⁶

The following observations, with regards to section 80A(c)(ii) of the Act, have been made by tax scholars in South Africa:

- 'The South African 'misuse or abuse' provision finds its origin (*apparently*) in the provisions of the Canadian GAAR.' (Emphasis added.)⁷
- 'At any rate, this kind of legislative 'borrowing' from foreign jurisdictions creates a further layer of uncertainty about the meaning of section 80A(c)(ii).'⁸
- 'Whatever the reason for its introduction, the important question remains: What does the phrase 'misuse or abuse' mean in the context of section 80A(c)(ii)?'⁹
- 'Firstly, it could be regarded as, effectively, a codification of the common-law position. In my view this would make it a dead letter, a provision without real effect. Secondly, in terms of the alternative approach, its effect would appear to be radically different and, to say the least,

⁴ Cilliers 2008a:86

⁵ Broomberg 2007:3

⁶ Mazansky 2007:162

⁷ Clegg 2007:37

⁸ Cilliers 2008b:107

⁹ Cilliers 2008a:86

incredibly far-reaching: If the provision is seen as somehow adding something to the common law ... it appears as if the inevitable conclusion is that it would effectively outlaw virtually all attempts at tax avoidance.'¹⁰

- 'Even then, if the other tests do not hit the transaction, it is submitted that the 'misuse or abuse' test will have no practical effect other than to raise the question as to why the legislature chose to insert it.'¹¹
- 'It seems to me that the wording of s80A(c)(ii) creates an unreasonably high level of uncertainty. The problem is simply that it is almost impossible to say with any degree of certainty what section 80A(c)(ii) means, even in principle.'¹²

Based on the above cited observations, it is submitted that section 80A(c)(ii) of the Act is an ambiguous provision. Uncertainty prevails as to its origin, meaning, application and effect in South Africa.

1.2 Objective

The objective of this study is to examine section 80A(c)(ii) in isolation, that is, without considering any of the other requirements necessary for the application of Part IIA, in order to determine its origin, meaning, application and effect in South Africa. In accomplishing this object consideration will be given to the following:

- The history and evolution of section 80A(c)(ii) of the Act in South Africa.
- The meaning of the words used in section 80A(c)(ii) of the Act.
- The origin of section 80A(c)(ii) of the Act.

¹⁰ Cilliers 2006:187

¹¹ Meyerowitz et al 2008:66

¹² Cilliers 2008a:109

- A comparison between section 245(4) of the Canadian Federal Income Tax Act and section 80A(c)(ii) of the Act.
- The application of section 245(4) of the Canadian Federal Income Tax Act and its effect on statutory interpretation in Canada.
- The potential impact (if any) of section 80A(c)(ii) on statutory interpretation in South Africa.
- Establishing on whom the burden of proof rests with regards to a misuse or abuse.
- Examples illustrating the potential application (or not) of section 80A(c)(ii).

1.3 Importance and value of the research

Section 80A(c)(ii) is crucial to the application of the general anti-avoidance rule (GAAR) since it applies 'in any context'. It is an alternative to the provisions of both section 80A(a), dealing with situations 'in the context of business' and section 80A(b), dealing with situations 'in a context other than business'. In relation to some of the other 'tainted elements', e.g. lack of commercial substance¹³, the requirements of section 80A(c)(ii) also appears rather undemanding. It only requires that a provision is misused or abused. Cilliers is of similar opinion and indicates that section 80A(c)(ii) can be described as 'the heart of section 80A'.¹⁴

According to the economist Adam Smith in his book, *Wealth of nations* - 1776, one of the basic principles of any tax system should be that individuals can determine the amount of tax payable by them with certainty.¹⁵ In addition Cilliers notes that all taxpayers 'are entitled to be placed in a position where they are able to reasonably ascertain, before committing to a certain transaction or course of action, 'the exact area within which they will be trespassers''.¹⁶ Because of the presumed ambiguous nature of section

¹³ The requirements necessary to establish a lack of commercial substance are dealt with exhaustively and scattered through the rest of the GAAR, i.e. section 80C, 80D and 80E.

¹⁴ Cilliers 2008a:85-86

¹⁵ Smith 1973

¹⁶ Cilliers 2006:185

80A(c)(ii), certainty with regards to its meaning, application and effect is of cardinal importance. Furthermore, the immense powers imparted to the South African Revenue Service (SARS) when an arrangement is an impermissible avoidance arrangement aggravates this concern.¹⁷

The proposed research will give more certainty to taxpayers and tax consultants¹⁸ in South Africa by providing them with a clearer picture as to how and when section 80A(c)(ii) of the Act may be applied. As there is no indigenous litigation available with regards to this new provision, the research will also assist tax officers who are contemplating the application of section 80A(c)(ii) to a proposed arrangement.

1.4 Research design, methods and scope

A non-empirical research method will be followed as the analysis of section 80A(c)(ii) of the Act can be done with reference to already published data. Data include literature and statutory laws (both foreign and local).

In analyzing the origin, meaning, application and effect of section 80A(c)(ii) reference will to a great extent be made to existing practice statements and case law in Canada. Judgments of the courts of other countries, although not binding on South African courts, are of significance because they have persuasive value.¹⁹

¹⁷ See section 80B of the Act.

¹⁸ Kolitz (2007:45) states the following: 'The provisions of the new GAAR present a challenge to both taxpayers and their advisers as they attempt to determine exactly how the new legislation should be interpreted and how it will apply.'

¹⁹ Clegg & Stretch 2007:2.4.1

1.5 Outline of the chapters

1.5.1 History and evolution of section 80A(c)(ii) of the Act in South Africa

Chapter 2 investigates the history and evolution of section 80A(c)(ii) of the Act in South Africa. This is essential as the courts often refer to the legislative history of a provision when construing statutes.

1.5.2 Examining the language of section 80A(c)(ii) of the Act

Chapter 3 analyzes the words contained in section 80A(c)(ii) of the Act in order to determine their potential meaning and scope.

1.5.3 Origin of section 80A(c)(ii) of the Act

Chapter 4 investigates into the origin of section 80A(c)(ii) of the Act. This exercise will establish a point of reference to which section 80A(c)(ii) can be compared in order to determine its possible application and effect in South Africa.

1.5.4 A comparison between section 245(4) of the Canadian Act and section 80A(c)(ii) of the Act

Chapter 5 performs an evaluation to identify and explicate the differences and similarities between section 245(4) of the Canadian Federal Income Tax Act (Canadian Act) and section 80A(c)(ii) of the Act. This will give an indication of whether section 245(4) can be adopted as an appropriate comparative for section 80A(c)(ii).

1.5.5 The application of the misuse or abuse rule in the Canadian jurisprudence

Chapter 6 examines Canadian case law relating to section 245(4) of the Canadian Act, the proposed root of section 80A(c)(ii) of the Act. The aim is to shed light on the application of the misuse or abuse rule in the Canadian jurisprudence. This can give an indication of how the misuse or abuse rule, also contained in section 80A(c)(ii) of the Act, may be applied in South Africa.

1.5.6 The effect of section 245(4) of the Canadian Act on statutory interpretation in Canada

Chapter 7 will establish the approach to statutory interpretation in Canada both before and after the application of section 245(4) of the Canadian Act. This will reveal the effect of section 245(4) on statutory interpretation in Canada which will allow inferences to be drawn as to the possible effect of section 80A(c)(ii) of the Act on statutory interpretation in South Africa.

1.5.7 The proposed effect of section 80A(c)(ii) of the Act on statutory interpretation in South Africa

Chapter 8 examines the approach to statutory interpretation in South Africa on a pre and post Constitutional level. This chapter then evaluates whether the approach to statutory interpretation, as presumably required by section 80A(c)(ii) of the Act, will have any effect on the approach followed in South Africa.

1.5.8 Section 80A(c)(ii) of the Act and the ‘spirit of the law’

Chapter 9 investigates whether section 80A(c)(ii) of the Act requires the court to have regard to the ‘spirit of the law’ when interpreting statutes.

1.5.9 Burden of proof with regards to section 80A(c)(ii) of the Act

Chapter 10 will attempt to establish on whom the burden of proof rests with regards to a misuse or abuse of the provisions of the Act, including the provisions of Part IIA.

1.5.10 Examples

Chapter 11 concludes the research with a few examples in order to confirm the contention raised with regards to the effect of section 80A(c)(ii) of the Act on statutory interpretation in South Africa.

1.5.11 Conclusion

Chapter 12 provides a summary of the research as well as the author's conclusion with regards to the stated objectives.

CHAPTER 2

History and evolution of section 80A(c)(ii) of the Act in South Africa

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CHAPTER 2

History and evolution of section 80A(c)(ii) of the Act in South Africa

2.1 Introduction

When interpreting statutory provisions, the courts often refer to the legislative history of the statutory provision.²⁰ Amendments during the development of section 80A(c)(ii) can serve as an indication of its potential purpose and effect. The evolution of section 80A(c)(ii) will therefore be analyzed from the initial recommendation in the Third Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa, 1995 (the Katz Commission) through to its enactment in November 2006.²¹

2.2 The Katz Commission

The misuse or abuse concept was introduced in 1995 by the Katz Commission in its Report into Tax Reform. The Katz Commission stated that:

‘Concern has been expressed about the use of the business test as a basis for the normality requirement in that transactions, which, for example, utilize a tax incentive, granted by the legislation to encourage the very transaction in question, could be a victim of the provision. This is an understandable concern and consideration could be given to a similar provision adopted by Canada, which has it that the anti-avoidance provision is not to apply where it may reasonably be

²⁰ Solomon JA states the following in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at page 554: ‘It is true that owing to the elasticity which is inherent in language it is admissible for a court in construing a statute to have regard not only to the language of the Legislature, but also to its object and policy as gathered from a comparison of its several parts, *as well as from the history of the law* and from the circumstances applicable to its subject matter.’ (Emphasis added.) The importance of the legislative history of a provision is also stressed by De Ville (2001:233).

²¹ The misuse or abuse concept will be indicated in bold when cited.

considered that the transaction would not result directly or indirectly in a misuse of the provisions of the Act or an abuse having regard to the provisions of the Act, read as a whole.²²

With regards to the above concern, the Katz Commission recommended that the general anti-avoidance provision, contained in section 103(1) of the Act, should be remedied as follows:

‘The provisions of section 103(1) must **not apply where** it may reasonably be considered that the transaction would **not result directly or indirectly in a misuse of the provisions of the Act or an abuse having regard to the provisions of the Act, read as a whole.**’²³

This recommendation by the Katz Commission was however not adopted by the legislature when section 103(1) of the Act was amended in 1996.

2.3 The draft version of section 80A(c)(ii) of the Act

The misuse or abuse concept, although couched in seemingly different terms, made its re-appearance in 2005 in the draft version of section 80A(c)(ii) of the Act, which read as follows:

‘An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and ...; or (c) in any context-...; or (ii) **it would frustrate the purpose of any provision of this Act (including the provisions of this Part).**’

²² Katz 1995:133

²³ Katz 1995:133

Although the words 'misuse' or 'abuse' were substituted with 'frustrate', this change, it is submitted, did not bring about a significant effect. This, as it will later also be revealed, is due to the terms 'exploit', 'misuse' and 'frustrate' in essence being synonyms to one another, with their sense most adequately captured by the word 'frustrate'.²⁴

The recommendation of the Katz Commission, however, referred to a 'misuse of the provisions of the Act or an abuse' whereas the draft version of section 80A(c)(ii) of the Act only referred to 'frustrate the purpose of any provision of this Act'. The rationale behind the draft version of section 80A(c)(ii) was apparently to discourage 'impermissible avoidance arrangements that rely upon excessively literal or technical readings of the tax laws to defeat their purpose'.²⁵ Reference to a misuse or abuse, however, 'presupposes that there is some identifiable non-abusive use of each provision of the Act (and the Act as a whole), which can in some way be used as a yardstick against which to measure misuse or abuse'.²⁶ Whereas the purpose of a provision is ascertainable and the ambit of such an inquiry within reasonable bounds, determining a yardstick against which to measure a misuse or abuse is a vague and seemingly incomprehensive inquiry²⁷ i.e. abuse is in the eye of the beholder.²⁸ It seems therefore that the inquiry under the proposal by the Katz Commission is a much wider one than that of the draft version of section 80A(c)(ii).

Using the word 'wider' in the above explanation portrays the idea that the Katz Commission proposed to enlarge the scope of section 103(1), by explicitly referring to the concept of a misuse or abuse. However, as will be explained, it served the opposite purpose. The recommendation by the Katz Commission is cast in negative language. Its proposed purpose was to avoid

²⁴ Canada Trustco Mortgage Company v Canada 2005 SCC 54 at paragraph 49

²⁵ South African Revenue Services 2006:16

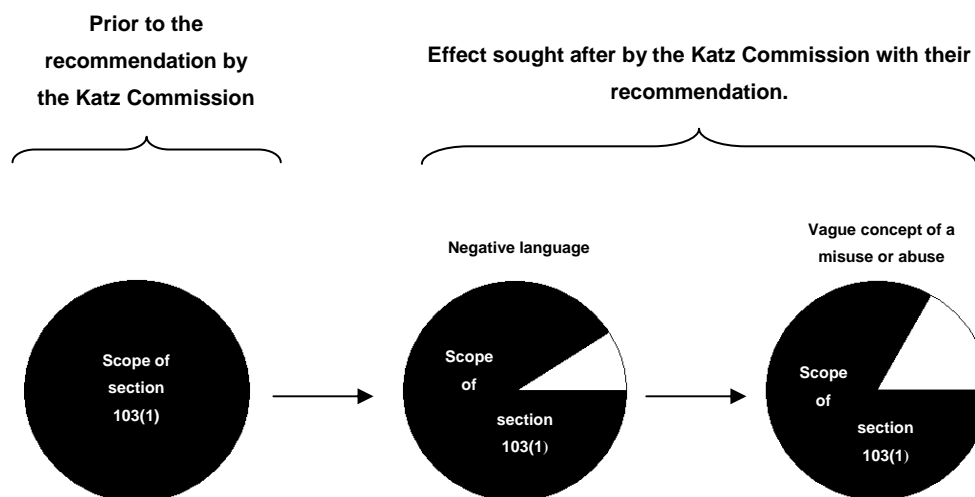
²⁶ Clegg 2007:37

²⁷ An inquiry as to the misuse or abuse of a provision has been referred to by Cilliers (2008b:110) as an 'invisible yardstick, a stealthful nocturnal assassin'.

²⁸ Clegg 2007:36

transactions, 'which, for example, utilize a tax incentive, granted by the legislation to encourage the very transaction in question,' from falling victim to section 103(1).²⁹ The recommendation by the Katz Commission was thus aimed at establishing an appropriate line of limitation on the operation of section 103(1). By utilising the misuse or abuse concept (which seemingly is a very wide inquiry) the Katz Commission enhanced their recommendation's capacity as a line of limitation. See Figure 2.1.

Figure 2.1: Proposed effect of the recommendation by the Katz Commission on the scope of section 103(1)



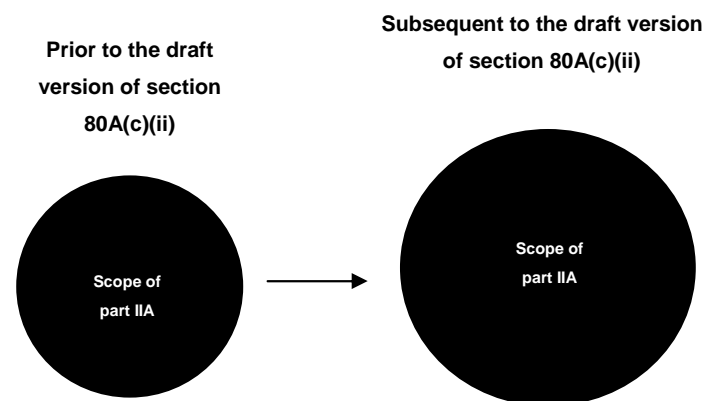
The positive language in which the draft version of section 80A(c)(ii) is worded serves, it is submitted, an opposite purpose: the expansion of the operation of Part IIA. By formulating the draft version in positive language, the provision was transformed from being a saving clause to a 'tainted element' which, if found to be present, could result in the application of Part IIA.³⁰ However, by not employing the misuse or abuse concept, it is submitted, its expansion was kept within reasonable bounds i.e. ascertaining whether the purpose of the legislation has been frustrated is (seemingly) a much more confined inquiry

²⁹ Katz 1995:133

³⁰ That which was originally intended to 'save' the taxpayer (by limiting Part IIA) was thus now turned against him (by expanding Part IIA).

than ascertaining whether a provision has been misused or abused. See Figure 2.2.

Figure 2.2: Proposed effect of the draft version of section 80A(c)(ii) on the scope of Part IIA



2.4 The enacted section 80A(c)(ii) of the Act

Section 80A(c)(ii), as finally enacted, concludes in a different form to that of the draft version:

‘An avoidance arrangement is an impermissible avoidance arrangement if its sole or main purpose was to obtain a tax benefit and ...; or (c) in any context-...; or (ii) **it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part).**’

The enacted version of section 80A(c)(ii) of the Act has a stronger resemblance to the recommendation by the Katz Commission than the draft version thereof. However, the enacted version of section 80A(c)(ii), like the draft version, is couched in positive language, which furnishes an additional ground for the application of Part IIA, and thus expands the application thereof.

The words ‘directly or indirectly’ did not appear in the draft version of section 80A(c)(ii), but was inserted in the enacted version. It is submitted that these

words have been inserted to prevent unintended gaps in section 80A(c)(ii). If these words have been omitted it would enable a taxpayer to argue that an indirect misuse or abuse of provisions will not be able to be targeted by section 80A(c)(ii). This insertion, it is submitted, is an example of government increasing the complexity of tax laws to pre-empt possible avoidance from aggressive tax-planners. The reason for this is that government suffers from the first mover disadvantage: it lays out rules, which are then analyzed and parsed by taxpayers. Taxpayers have the advantage because government must 'put their goods on show for all to see'.³¹ This amendment thus expands the scope of part IIA. See Figure 2.3.

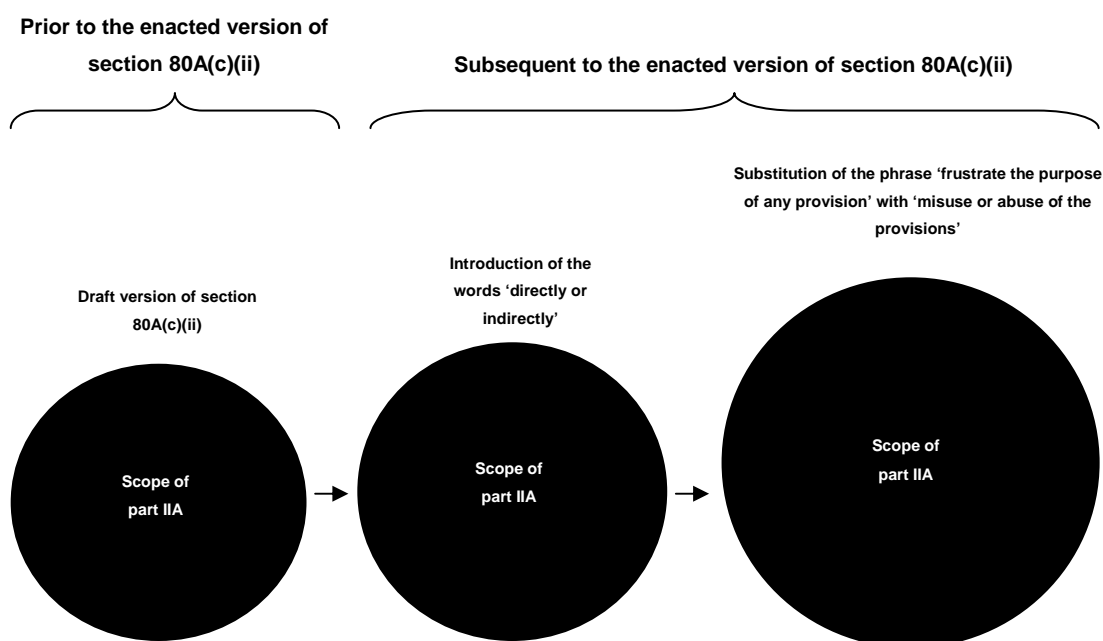
Furthermore, the term 'frustration' in the draft version of section 80A(c)(ii) was replaced by the term 'misuse or abuse' in the enacted version. However, as mentioned earlier, the terms 'exploit', 'misuse' and 'frustrate' are in essence synonymous, with their sense most adequately captured by the word 'frustrate'.³² It is therefore submitted that this change in wording is of an immaterial nature.

The draft version of section 80A(c)(ii), however, referred to 'frustrate the purpose of any provision of this Act' whereas the enacted version of section 80(c)(ii) refers to 'misuse or abuse of the provisions'. This substitution, it is submitted, results in a significant expansion of Part IIA. See Figure 2.3. As explained earlier, it appears that establishing whether a misuse or abuse of a provision has occurred is a much wider inquiry than determining whether the purpose of a provision has been frustrated. This, presumably, is due to the inquiry as to the purpose of a provision being a much more confined one than the inquiry as to some uncertain yardstick against which to measure a misuse or abuse.

³¹ South African Revenue Services 2005:11

³² Canada Trustco Mortgage Co. v. Canada 2005 SCC 54 at paragraph 49

Figure 2.3: Proposed effect of the enacted version of section 80A(c)(ii) on the scope of Part IIA



2.5 Conclusion

The misuse or abuse concept was introduced in 1995 by the Katz Commission. It proposed that the concept be inserted as a saving clause, acting as an appropriate line of limitation on the operation of section 103(1). Its function was however reversed, it is submitted, in the draft version, as well as in the enacted version of section 80A(c)(ii): it expands the application of Part IIA. This was accomplished by couching the provision in positive language (which furnishes an additional ground for the application of Part IIA) as opposed to negative language (which would have served as a salvage clause to the taxpayer from the application of Part IIA).

A comparison between the draft version and enacted version of section 80A(c)(ii) of the Act revealed the following amendments:

- The words 'directly or indirectly' were introduced into the enacted version. It is submitted that these words were inserted to prevent any

unintended gaps in section 80A(c)(ii). It therefore expands the operation of section 80A(c)(ii) and thus the application of Part IIA.

- The words 'frustrate the purpose of any provision' was replaced with the words 'misuse or abuse of the provisions'. In this chapter it was contented that reference to 'misuse or abuse of the provisions' expands the application of Part IIA beyond the boundaries presumed to be set under the reference 'frustrate the purpose of any provision'. This contention implies that the concept of a misuse or abuse of a provision goes beyond that of merely frustrating the purpose of a provision. The validity of this contention will be examined in subsequent chapters³³ which will attempt at establishing the meaning, application and effect of section 80A(c)(ii) of the Act.

Having analyzed the evolution of section 80A(c)(ii) it is now necessary to ascertain the meaning of the language used in its enacted version. This is the subject of chapter 3.

³³ See chapters 3 & 6

CHAPTER 3
Examining the language of section 80A(c)(ii) of the Act

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CHAPTER 3

Examining the language of section 80A(c)(ii) of the Act

3.1 Introduction

It is a firmly established rule of statutory construction that a meaning must be given to every word.³⁴ The language of section 80A(c)(ii) of the Act will therefore be examined to determine its meaning. This exercise will also aid in determining the possible nature and scope of section 80A(c)(ii).

3.2 It would result in

The ordinary meaning of the word 'result' is as follows:

'Result ●v. occur or follow ➤ (result in) have a specified end or outcome.'³⁵

The word 'result', therefore, refers to the 'end or outcome' of an arrangement. In *Newton v COT*³⁶ Lord Denning stated the following at page 763:

'The word 'effect' means the end accomplished or achieved.'

The 'end or outcome' of an arrangement, it is submitted, can therefore be construed as the 'effect' of the arrangement. This implies, it is submitted, that the word 'result' and the word 'effect' are in essence synonyms. In *Newton v COT*³⁷ Lord Denning indicated that the 'effect' of an arrangement must be determined objectively, irrespective of the motive of the parties.³⁸ See Figure 3.1.

³⁴ Emslie et al 1995:23

³⁵ South African Concise Oxford Dictionary 2002:997

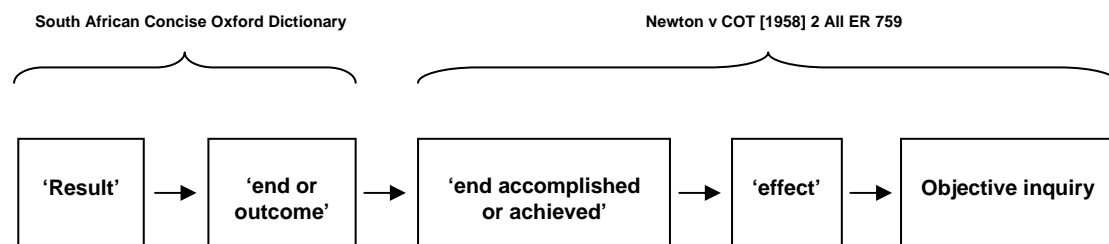
³⁶ *Newton v COT* [1958] 2 All ER 759

³⁷ *Newton v COT* [1958] 2 All ER 759 at page 763

³⁸ The word 'effect' is normally contrasted with the word 'cause' or 'motive' which has a subjective nature.

Therefore, it is submitted, the word ‘result’ lays down an objective standard. This contention implies that, in order for section 80A(c)(ii) to be applicable, the result of an avoidance arrangement must, objectively measured, be to misuse or abuse a provision of the Act.

Figure 3.1: Construing the meaning of the word ‘result’:



3.3 Directly or indirectly

The ordinary meaning of the words ‘direct’, ‘directly’, and ‘indirectly’ are as follows:

‘Direct’ ●adj. 3 without intervening factors or intermediaries.’³⁹

‘Directly’ ●adv. 1 in a direct manner.’⁴⁰

‘Indirect’ ●adj. 1 not direct.’⁴¹

In *SIR v Consolidated Citrus Estates Ltd*⁴² the meaning of the word ‘directly’ was explained by Galgut JA at page 148 as follows:

“‘Directly’ appears to have been deliberately added in order to serve some purpose that the Legislature had in mind. The purpose, I think, was to postulate that the connection between the taxpayer’s incurring

³⁹ South African Concise Oxford Dictionary 2002:329

⁴⁰ South African Concise Oxford Dictionary 2002:329

⁴¹ South African Concise Oxford Dictionary 2002:587

⁴² *SIR v Consolidated Citrus Estates Ltd* 1976 38 SATC 126

the expenditure and the object for which it was incurred ... should be direct, i.e. straight and close, not devious and remote.'

The words 'directly' and 'indirectly' are antonyms. By using them simultaneously the legislature has enhanced the reach of section 80A(c)(ii) of the Act. The word 'directly', it is submitted, means 'straight and close', whereas the word 'indirectly' means 'devious and remote'. The 'straight and close' or 'devious and remote' effect of the avoidance arrangement must therefore be to 'misuse or abuse' a provision of the Act.

3.4 In the misuse or abuse

The ordinary meaning of the words 'misuse' and 'abuse' are as follows:

'misuse' ●v. 1 use wrongly. 2 treat badly or unfairly.'⁴³

'abuse' ●v. 1 use to bad effect or for a bad purpose.'⁴⁴

The ordinary meaning of the word 'abuse' has a strong resemblance to the language in which the draft version of section 80A(c)(ii) was couched, i.e. 'frustrate the purpose of any provision'. It seems therefore that ascertaining the purpose of a provision might be inherently imbedded in the linguistic nature of the word 'abuse'. This could imply that by substituting the phrase 'frustrate the purpose of any provision' (in the draft version) with the phrase 'misuse or abuse of the provisions' (in the enacted version) in fact not resulting in a broader inquiry under section 80A(c)(ii) of the Act.⁴⁵ The abuse of a provision seems to be synonymous with frustrating the purpose of a provision.

⁴³ South African Concise Oxford Dictionary 2002:745

⁴⁴ South African Concise Oxford Dictionary 2002:5

⁴⁵ In chapter 2 it was contended that the concept of a misuse or abuse of a provision goes beyond that of merely frustrating the purpose of a provision.

Cilliers indicates the following with regards to the meaning of the words 'misuse' and 'abuse':

'It is also appropriate to point out here that it is doubtful whether 'misuse' and 'abuse' have materially different meanings. Speculating about this is probably a fruitless exercise. The two words mean roughly the same and, in the context of section 80A(c)(ii), can probably be regarded as synonymous. In my view this is a case where one ought to disregard the presumption that each and every word in a statutory provision must be given an independent meaning and effect. In using both the word 'misuse' and the word 'abuse' the legislature probably merely acted *ex abundanti cautela*. I surmise that it did not wish to denote two distinct concepts, but rather merely tried to ensure that the concept being expressed would be very clearly understood. The courts will therefore probably interpret the phrase as denoting a single, indivisible concept.'⁴⁶

Support for the above cited view is evident in the following statement by the court in *Canada Trustco Mortgage Company v Canada*⁴⁷:

'While the Explanatory Notes use the phrase 'exploit, misuse or frustrate', we understand these three terms to be synonymous, with their sense most adequately captured by the word 'frustrate'.'

The words 'misuse' and 'abuse', it is submitted, are therefore synonyms. They imply utilising a provision 'wrongly' or for a 'bad purpose'. It seems therefore that the misuse or abuse inquiry involves establishing the purpose of a provision in order to ascertain whether such purpose has been contravened.

⁴⁶ Cilliers 2008a:87

⁴⁷ *Canada Trustco Mortgage Company v Canada* 2005 SCC 54 at paragraph 49

3.5 Of the provisions of this Act

The phrase ‘of the provisions of this Act’ can be construed as follows: of the provisions of the Income Tax Act No. 58 of 1962, as amended.⁴⁸ These words, together with the phrase ‘including the provisions of this Part’ outline the operative scope of section 80A(c)(ii) of the Act.

3.6 Including the provisions of this Part

‘This Part’ refers to Part IIA of the Act. The concept of a misuse or abuse will therefore also apply to the provisions of Part IIA itself. SARS states that it is inevitable that some will seek to parse the provisions of Part IIA to find unintended gaps or loopholes.⁴⁹ In these circumstances the misuse or abuse requirement will serve to ensure that Part IIA is not misused or abused in ways that would frustrate its purpose in defeating impermissible tax avoidance and suppressing the mischief against which it is directed.

3.7 Conclusion

The words ‘it would result in’, it is submitted, yields an objective standard when determining whether an avoidance arrangement misuses or abuses the provisions of the Act (including Part IIA).

The words ‘directly or indirectly’, it is submitted, implies that the connection between the avoidance arrangement and the misuse or abuse of the provisions of the Act (including Part IIA) may either be ‘straight and close’ or ‘devious and remote’.

⁴⁸ See section 1 of the Act.

⁴⁹ South African Revenue Services 2006:16

The words 'misuse' and 'abuse' roughly have the same meaning. In essence, it is submitted, it means 'exploiting' or 'frustrating' the provisions of the Act (including Part IIA) which implies using such provisions 'wrongly' or for a 'bad purpose'.

Reference to the word 'purpose' in the above construction, it is submitted, may imply establishing the purpose of a provision in order to determine whether such purpose has been frustrated. This could involve adopting a similar approach to that, presumably, required by the draft version of section 80A(c)(ii). If this argument is correct, it could refute the contention furnished in chapter 2, where it was indicated that the inquiry as to whether a provision has been misused or abused goes beyond that of merely ascertaining whether the purpose of a provision has been frustrated. This issue will be addressed in a subsequent chapter⁵⁰ which will attempt at establishing the possible effect and application of section 80A(c)(ii).

The scope of section 80A(c)(ii), it was found, is limited to 'the provisions of this Act (including the provisions of this Part)'. This refers to the Income Tax Act No. 58 of 1962, as amended, and specifically includes Part IIA (which contains the GAAR) thereof.

Having examined the language of section 80A(c)(ii) it is now necessary to ascertain its origin. This is a crucial step in the analysis of section 80A(c)(ii) as it will provide an appropriate source from which inferences can be made as to its application and effect. This is the subject matter of chapter 4.

⁵⁰ See chapter 6.

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Origin of section 80A(c)(ii) of the Act

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CHAPTER 4

Origin of section 80A(c)(ii) of the Act

4.1 Introduction

Determining the origin of section 80A(c)(ii) of the Act is a critical step in the analysis thereof. This exercise will establish a point of reference to which section 80A(c)(ii) can be compared and from which its application can be explained. It will also serve as a source in determining the possible effect of section 80A(c)(ii) on the South African jurisprudence and statutory interpretation. The origin of section 80A(c)(ii) will thus form the foundation on which the subsequent analysis will be built.

4.2 The opinion of several tax scholars in South Africa

4.2.1 Mazansky

‘It is a concept that has never been adopted in South Africa, though it is a fairly familiar concept in European jurisdictions and, latterly in Canada.’⁵¹

4.2.2 Davis

‘The misuse or abuse rule derives (in part at least) from the Canadian Federal Income Tax Act.’⁵²

4.2.3 Cilliers

‘It seems that the changed wording has its roots in the Canadian GAAR and in the case law that has developed around it.’⁵³

⁵¹ Mazansky 2007:162

⁵² Davis et al 2007:80A-11

⁵³ Cilliers 2008a:86

4.2.4 Clegg & Stretch

‘The concept of ‘misuse or abuse’ of provisions finds its origin (apparently) in the provisions of the Canadian GAAR which uses a similar provision in conjunction with a bona fide purpose test.’⁵⁴

4.2.5 De Koker

‘The ‘misuse or abuse’ doctrine is generally seen to emanate in tax law from the provisions of the Canadian GAAR, which employs a largely similar provision in conjunction with a bona fide purpose test.’⁵⁵

4.2.6 Conclusion

It is submitted that section 80A(c)(ii) has its roots in Canadian and certain European jurisdictions.⁵⁶ It is therefore necessary to examine the anti-avoidance legislation in these jurisdictions in order to establish the origin of section 80A(c)(ii), which will then yield an appropriate point of reference.

4.3 Canada

The Canadian GAAR is contained in section 245 of the Canadian Act. The misuse or abuse concept appears in section 245(4) thereof, which provides a basis for distinguishing between legitimate tax planning and abusive tax avoidance.⁵⁷ This concept, upon its adoption in 1988, was also foreign to the Canadian jurisprudence. According to the Explanatory Notes to Legislation Relating to Income Tax (Canadian Explanatory notes), accompanying the enactment of section 245, subsection (4) draws on the doctrine of ‘abuse of law’ which applies in some European jurisdictions.⁵⁸

⁵⁴ Clegg & Stretch 2007:26.3.5

⁵⁵ De Koker 2007:19.7

⁵⁶ This is in accord with the Explanatory Memorandum (National Treasury 2006:63)

⁵⁷ De Koker 2007:19.7

⁵⁸ Wilson 1988

4.4 European jurisdictions

A number of European jurisdictions apply the doctrine of 'abuse of law' to defeat schemes intended to abuse tax legislation. The doctrine holds that abuse will occur when a taxpayer is not applying a statute according to its object and purpose i.e. circumventing the scope of a taxing rule, or unduly benefiting from an exemption provision.⁵⁹

France is an example of a European country applying the doctrine of 'abuse of law'. The French court applies this doctrine to 'challenge instruments which, seeking the benefit of a literal application of the law to the detriment of the objective sought by their makers, could not have been motivated by any purpose other than that of escaping or reducing the tax liability which, but for these instruments, the interested party would normally have borne in light of its actual situation and activities.'⁶⁰

In essence the doctrine of 'abuse of law', it is submitted, is a matter of statutory interpretation: it requires a purposive approach to the construction of statutes in order to nullify schemes that frustrate the identified purpose.

4.5 Conclusion

Section 80A(c)(ii) of the Act derives (in part at least) from the Canadian GAAR contained in section 245 of the Canadian Act. The Canadian GAAR uses a similar provision to section 80A(c)(ii) in subsection 245(4). The misuse or abuse concept was however not developed in Canada. It draws on the doctrine of 'abuse of law' which applies in some European jurisdictions, e.g. France.

In the analysis of section 80A(c)(ii) reference will be confined to section 245(4) of the Canadian Act. A useful starting point will therefore be to

⁵⁹ Confederation Fiscale Européenne 2007:4

⁶⁰ Leclercq 2007:235

compare section 245(4) of the Canadian Act and section 80A(c)(ii) of the Act.
This is done in chapter 5.

CHAPTER 5
A comparison between section 245(4) of the Canadian Act
and section 80A(c)(ii) of the Act

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CHAPTER 5

A comparison between section 245(4) of the Canadian Act and section 80A(c)(ii) of the Act

5.1 Introduction

From chapter 4 it appears that section 80A(c)(ii) originates from section 245(4) of the Canadian Act. This presupposes some universal attribute between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act.

Section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act will therefore be compared in order to establish the similarities and differences between them. This exercise is essential as it will give an indication of whether section 245(4) can be adopted as an appropriate comparative for section 80A(c)(ii). In addition, similarities will confirm the adoption of existing Canadian principles, whilst differences may indicate the contrary.

Each of the subsequent sections will therefore commence by contrasting the language in section 80A(c)(ii) of the Act with that of section 245(4) of the Canadian Act. Differences and similarities in language will be indicated in bold.

5.2 Similarities

5.2.1 A misuse or abuse rule

Table 5.1: Comparison between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act: a similar misuse or abuse rule

Section 80A(c)(ii) of the Act	Section 245(4) of the Canadian Act
(c) in any context – (ii) it would result directly or	(4) For greater certainty, subsection 245(2) does not apply to a transaction where it may

<p>indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part).</p>	<p>reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.</p>
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Both section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act contain a misuse or abuse rule.⁶¹ See Table 5.1. This rule, in both sections, is couched in a similar format utilizing analogous terminology. The misuse or abuse rule, in both section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act, it is submitted, forms the operative heart thereof. This raises the presumption that the application of the misuse or abuse rule in section 80A(c)(ii) of the Act will be in conformity to its application in section 245(4) of the Canadian Act. A related misuse or abuse rule thus strengthens the case for utilizing section 245(4) of the Canadian Act as a primary source in analyzing section 80A(c)(ii) of the Act.

In order to uphold this contention it must be determined whether any apparent linguistic differences between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act can be of such a nature that it affects the application of the misuse or abuse rule in the respective sections. The object is thus to establish whether the misuse or abuse rule will presumably be applied universally in the case of both sections 80A(c)(ii) and section 245(4) despite such differences. If, subsequently, this is found not to be true, then it will be necessary to qualify the case for adopting section 245(4) as an appropriate comparative for section 80A(c)(ii).

⁶¹ In Table 5.1 the words in bold indicate the misuse or abuse rule, as contained in the respective sections.

5.3 Differences

5.3.1 Positive language as opposed to negative language

Table 5.2: Comparison between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act: positive language and negative language

Section 80A(c)(ii) of the Act	Section 245(4) of the Canadian Act
(c) in any context – (ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part).	(4) For greater certainty, subsection 245(2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.

Section 245(4) of the Canadian Act is cast in negative language. See Table 5.2. It indicates that section 245(2)⁶² may not be applied when a transaction does not directly or indirectly result in a misuse or abuse. The Canadian

⁶² Subsection 245(2) of the Canadian Act serves as the deeming provision in section 245. It requires that the tax benefit attached to an ‘avoidance transaction’ be nullified. Section 245(1) of the Canadian Act defines an ‘avoidance transaction’ as ‘any transaction that ... would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit’. This requirement, is broadly similar to that of the requirement contained in section 80A(b) of the Act. In addition, section 245(1) of the Canadian Act defines a ‘transaction’ as including ‘an arrangement or event’, which is comparable to the definition of an ‘arrangement’ contained in section 80L of the Act.

Explanatory Notes state the following with regards to section 245(4) of the Canadian Act:

‘... subsection 245(4) contains an important limitation to the application of section 245. Even where a transaction results, directly or indirectly, in a tax benefit and has been carried out primarily for tax purposes, section 245 will not apply if it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of the Act or an abuse having regard to the provisions of the Act read as a whole.’⁶³

The Canadian Act, therefore, applies the misuse or abuse rule in section 245(4), not as a requirement, but as an appropriate line of limitation on the operation of section 245.⁶⁴ This prevents section 245 from being too broad and hitting transactions which the legislature could never have intended to attack.⁶⁵ See Figure 5.1.

Figure 5.1: Proposed effect of section 245(4) on the scope of section 245



Section 80A(c)(ii) of the Act is cast in positive language. See Table 5.2. It indicates that an ‘avoidance arrangement’ will qualify as an ‘impermissible avoidance arrangement’ if it would result in a misuse or abuse of the provisions of the Act. The function that the misuse or abuse rule plays in section 245(4) of the Canadian Act has therefore been reversed in section

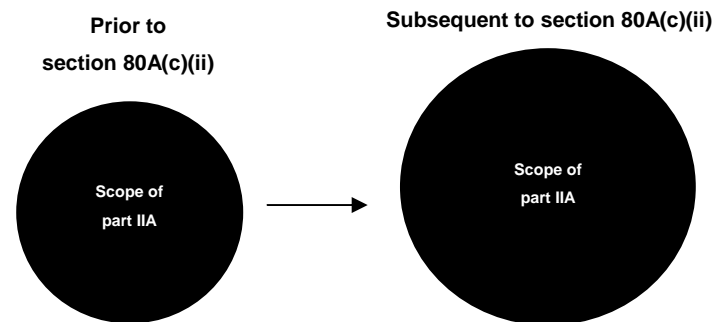
⁶³ Wilson 1988

⁶⁴ Olivier & Honiball 2008:405

⁶⁵ Broomberg 2007:8

80A(c)(ii) of the Act.⁶⁶ The misuse or abuse rule serves not as an appropriate line of limitation, but as an additional requirement to the operation of section 80A. It thereby expands the scope of Part IIA. See Figure 5.2.

Figure 5.2: Proposed effect of section 80A(c)(ii) on the scope of Part IIA



By reversing the function which the misuse or abuse rule plays in section 245 of the Canadian Act, the draftsmen have thus stripped Part IIA of any limitations and in so doing ignored the dangers of formulating a general anti-avoidance measure too widely.⁶⁷ This could result in a disturbance of the equilibrium between the power of the fiscus and a taxpayer conducting his business, and plunge Part IIA into a similar predicament than that in which its predecessor, section 103(1), was before the judgment in *CIR v King*⁶⁸ when its ambit was considered to be too wide. The Courts could, if it considers Part IIA's ambit to be too wide, look negatively at it which could lead to a very narrow and restricted interpretation of the statute and frustrate the fiscus.⁶⁹

In addition, with regards to positive and negative language, the following was stated by Van Heerden J in *Sayers v Khan*⁷⁰ at page 61:

⁶⁶ It would be remembered that the manner in which the rule is specified in section 80A(c)(ii) of the Act is also in contrast to the recommendation by the Katz Commission in 1995. The Katz Commission favoured that the rule be cast in the negative.

⁶⁷ Broomberg 2007:8

⁶⁸ *CIR v King* 14 SATC 184

⁶⁹ Louw 2007:40

⁷⁰ *Sayers v Khan* [2002] 1 All SA 57 (C)

‘Other semantic guidelines which have crystallised in the South African case law are to the effect that, whereas the use of negative language has a peremptory connotation, the use of positive language suggests that the relevant statutory provision is directory.’

Negative language reduces the scope of a provision as it has a decisive nature. Positive language, on the other hand, expands the scope of a provision as it has an indicative nature. This confirms the contention that section 245(4) limits the scope of section 245, whereas section 80A(c)(ii) expands the scope of Part IIA.

Although section 245(4) of the Canadian Act is cast in negative language and section 80A(c)(ii) of the Act in positive language, this does not alter the appropriateness of section 245(4) as a comparative for section 80A(c)(ii). The difference in language only affects the scope of the respective anti-avoidance legislations, section 245 of the Canadian Act and Part IIA of the Act. The application of the misuse or abuse rule, however, is not affected by this deviation: in the case of both section 245 and Part IIA it will have to be applied similarly.

5.3.2 The flexibility of the courts when assessing for a misuse or abuse

Table 5.3: Comparison between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act: judicial flexibility when considering a misuse or abuse

Section 80A(c)(ii) of the Act	Section 245(4) of the Canadian Act
(c) in any context – (ii) it would result directly or indirectly in the misuse or abuse of the provisions of	(4) For greater certainty, subsection 245(2) does not apply to a transaction where it may reasonably be considered that the transaction would not result

<p>this Act (including the provisions of this Part).</p>	<p>directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.</p>
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The phrase ‘may reasonably be considered that the transaction’ in section 245(4) of the Canadian Act was omitted from section 80A(c)(ii) of the Act. See Table 5.3. In *Canada Trustco Mortgage Company v Canada*⁷¹ the court stated at paragraph 37:

‘[Section 245(4)] is tempered by the word ‘reasonably’, suggesting some ministerial and judicial leeway in determining abuse. It does not precisely define abuse or misuse.’

It seems therefore that by omitting the phrase ‘may reasonably be considered that the transaction’ from section 80A(c)(ii) of the Act, the legislature intended to restrict the ministerial and judicial flexibility in determining a misuse or abuse. The word ‘reasonably’ in section 245(4) of the Canadian Act implies a ‘fair and sensible consideration’⁷² of the provisions in question when evaluating them for a misuse or abuse. It could be that the legislature, by omitting this phrase from section 80A(c)(ii) of the Act, attempts to remind one of the established principle laid down in *Cape Brandy Syndicate v IRC*⁷³: ‘There is no equity about a tax.’ According to Emslie principles of equity are usually incapable of yielding an amount of tax that is fair.⁷⁴

The exclusion of the phrase ‘may reasonably be considered that the transaction’ in section 245(4) of the Canadian Act from section 80A(c)(ii) of

⁷¹ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54

⁷² *South African Concise Oxford Dictionary* 2002:974

⁷³ *Cape Brandy Syndicate v IRC* (1921) 1 KB 64 at page 71

⁷⁴ *Emslie et al* 1995:16

the Act, it is submitted, does not affect the appropriateness of utilising section 245(4) as a comparative for section 80A(c)(ii) of the Act. Although this deviation could raise the presumption that the South African courts will apply the misuse or abuse rule more ‘severely’ than the Canadian courts, it is submitted, that the selected approach⁷⁵ will not deviate significantly (if at all) from that followed in Canada.

5.3.3 Considering the Act as a whole when establishing a misuse or abuse

Table 5.4: Comparison between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act: considering the Act as a whole when assessing for a misuse or abuse

Section 80A(c)(ii) of the Act	Section 245(4) of the Canadian Act
<p>(c) in any context –</p> <p>(ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part).</p>	<p>(4) For greater certainty, subsection 245(2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.</p>

Section 245(4) of the Canadian Act states that a misuse or abuse should be determined ‘having regard to the provisions of this Act ... read as a whole.’

⁷⁵ More specifically: the courts attitude or sentiment when applying the misuse or abuse rule.

With regards to this phrase, the court, in *Canada Trustco Mortgage Company v Canada*⁷⁶, stated the following at paragraph 51:

‘This means that the specific provisions at issue must be interpreted in their legislative context, together with other related and relevant provisions, in light of the purposes that are promoted by those provisions and their statutory schemes.’

Section 80A(c)(ii) of the Act do not contain the words ‘having regard to the Act ... read as a whole’. See Table 5.4. Statutory interpretation, however, requires consideration of the context of the entire Act. In *City Deep Limited v Silicosis Board*⁷⁷ it was stated by Chief Justice Watermeyer, at page 702, that it is a well-known principle that –

‘... a particular provision in a statute must be construed in the light of all the other provisions, or as it is often put in Latin *ex visceribus actus*.’

According to De Ville statutory interpretation is required to take place ‘from the bowels of the Act’.⁷⁸ In other words, a statutory provision should not be construed on its own, but in the context of the entire Act. The Court will therefore have to take the Act as a whole into consideration when the misuse or abuse rule is applied.

Thus, although section 80A(c)(ii) of the Act does not specifically require that the misuse or abuse rule should be applied ‘having regard to the provisions of this Act ... read as a whole’, this requirement is inherently imbedded in our approach to statutory interpretation. This difference, it is submitted, will therefore not result in the application of the misuse or abuse rule, contained in section 80A(c)(ii) of the Act, from being applied differently than that of its relative in section 245(4) of the Canadian Act. The appropriateness of section

⁷⁶ *Canada Trustco Mortgage Company v Canada* 2005 SCC 54

⁷⁷ *City Deep Limited v. Silicosis Board* 1950 (1) SA 696 (A)

⁷⁸ De Ville 2001:142

245(4) of the Canadian Act as a comparative for section 80A(c)(ii) of the Act is thus not affected.

5.3.4 Taking the respective anti-avoidance legislation into account when assessing for a misuse or abuse

Table 5.5: Comparison between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act: considering the respective anti-avoidance legislation when establishing a misuse or abuse

Section 80A(c)(ii) of the Act	Section 245(4) of the Canadian Act
<p>(c) in any context –</p> <p>(ii) it would result directly or indirectly in the misuse or abuse of the provisions of this Act (including the provisions of this Part).</p>	<p>(4) For greater certainty, subsection 245(2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.</p>

Section 80A(c)(ii) of the Act specifically requires a consideration of Part IIA when applying the misuse or abuse rule. Section 245(4) of the Canadian Act specifically excludes considering section 245 when applying the misuse or abuse rule.⁷⁹ See Table 5.5.

⁷⁹ A closer inspection of section 245(4) prompts the following question: does the phrase ‘other than this section’ relate only to the ‘abuse’ part of the misuse or abuse rule, or does it relate to the entire misuse or abuse rule? This inquiry is triggered by the repetition of the phrase ‘the provisions of this Act’ subsequent to the words ‘misuse’ and ‘abuse’, but the omission of the phrase ‘other than this section’ from the former word. Chapter 6, however, will reveal that the misuse or abuse rule do not mandate two different inquiries, i.e. a misuse-inquiry and an abuse-inquiry. It requires a single unified inquiry. It is thus wrong,

The rationale behind the insertion of the phrase ‘including the provisions of this Part’ in section 80A(c)(ii) of the Act was to ensure that Part IIA of the Act is not misused or abused.⁸⁰ As an equivalent provision is absent from section 245(4) of the Canadian Act, it seems therefore that section 245 is vulnerable to a misuse or abuse.

This deviation, however, affects the scope of the misuse or abuse rule, not the application thereof: the misuse or abuse rule may be invoked against a misuse or abuse of Part IIA of the Act, but not of section 245 of the Canadian Act. The misuse or abuse rule, it is submitted, will nevertheless be applied similarly in both jurisdictions, but its reach in South Africa is greater than that of it in Canada. The appropriateness of section 245(4) as a comparative for section 80A(c)(ii) is thus left unaltered.

5.4 Conclusion

Section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act share the fundamental characteristic that they both contain a misuse or abuse rule which is stated in similar language, using similar terminology. As it is supposed that the misuse or abuse rule forms the operative heart of the respective sections, it reinforces the case for applying section 245(4) of the Canadian Act as an appropriate comparative to section 80A(c)(ii) of the Act.

The following linguistic differences was however apparent between section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act:

- Section 245(4) is expressed in negative language, indicating that section 245 will not apply where no misuse or abuse is found (thus limiting the

so it is argued, to refer to a ‘misuse part’ or an ‘abuse part’ of the misuse or abuse rule. In addition, chapter 3 confirmed (with reference to Canadian authority) that the words ‘misuse’ and ‘abuse’ are synonymous. It is therefore submitted that the phrase ‘other than this section’ relate to the entire misuse or abuse rule.

⁸⁰ South African Revenue Services 2006:16

scope of section 245). Section 80A(c)(ii) is cast in positive language indicating that Part IIA will be applied when a misuse or abuse is established (thus expanding the scope of Part IIA).

- The phrase 'may reasonably be considered that the transaction' appears in section 245(4) of the Canadian Act, but is absent from section 80A(c)(ii) of the Act. This, it is submitted, may limit the judicial flexibility the South African court has when determining abuse.
- Section 245(4) of the Canadian Act states that a misuse or abuse should be determined 'having regard to the provisions of this Act ... read as a whole.' Although such a requirement is absent from section 80A(c)(ii) of the Act, it was established that it is inherently imbedded in our approach to statutory interpretation.
- Section 80A(c)(ii) of the Act specifically requires a consideration of Part IIA when applying the misuse or abuse rule. Section 245(4) of the Canadian Act specifically excludes considering section 245 when applying the misuse or abuse rule. The scope of the misuse or abuse rule thus differs between the two sections.

The identified differences, it is submitted, do not alter the application of the misuse or abuse rule in section 80A(c)(ii) of the Act, from that of section 245(4) of the Canadian Act. This implies that the application of the misuse or abuse rule in section 80A(c)(ii) of the Act is (presumably) in conformity with that required by the rule in section 245(4) of the Canadian Act. Section 245(4) is therefore, it is submitted, an appropriate comparative for section 80A(c)(ii).

The approach required by the application of the misuse or abuse rule in the Canadian jurisprudence, it is submitted, will presumably be required by section 80A(c)(ii) of the Act. In order to make an inference as to the possible effect of section 80A(c)(ii) on the jurisprudence in South Africa, the Canadian

approach will have to be established. This forms the issue addressed in chapter 6.

CHAPTER 6
The application of the misuse or abuse rule in the Canadian
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CHAPTER 6

The application of the misuse or abuse rule in the Canadian jurisprudence

6.1 Introduction

As previously noted, the concept of a misuse or abuse is a fairly familiar one in Canada⁸¹: section 245(4) of the Canadian Act contains a misuse or abuse rule that is similar to that contained in section 80A(c)(ii) of the Act. The words 'misuse' and 'abuse' are, however, not defined in the Canadian Income Tax Act.⁸² In addition, the conjunction 'or' (in the phrase 'misuse or abuse') raises the question as to whether applying the misuse or abuse rule involves two different inquiries: a misuse inquiry and an abuse inquiry.

The precise meaning of the words 'misuse or abuse' (in section 80A(c)(ii)) is also not apparent. In chapter 2 it was contended that a 'misuse or abuse of the provisions' (in the enacted version of section 80A(c)(ii)) may possibly be a much wider inquiry than 'frustrate the purpose of any provision' (in the draft version). This, so it was argued, is due to the inquiry as to the purpose of a provision being a much more confined one than the inquiry as to some (presumably) uncertain yardstick against which to measure a misuse or abuse. This contention, however, was refuted in chapter 3 where it was argued that establishing whether a provision has been used for a 'bad purpose' was inherently imbedded in the linguistic nature of the word 'abuse'.

In order to uphold the latter contention it is necessary to ascertain how the Canadian court establishes whether a misuse or abuse has occurred. This will give an indication as to what constitutes a 'misuse or abuse of the provisions' and whether that deviates from 'frustrate the purpose of any provision'. An examination as to how the Canadian Court applies the misuse

⁸¹ Mazansky et al 2006:4

⁸² Hogg et al 1999:509

or abuse rule (which is utilized in assessing for a misuse or abuse) is thus central to this inquiry.

From the SARS' Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act (Discussion Paper) it is clear that the interpretation of a 'misuse or abuse' in Canadian case law is exactly what was intended by the South African legislature.⁸³ This is also the contention raised in chapter 5: a similar misuse or abuse rule in both sections 245(4) of the Canadian Act and section 80A(c)(ii) of the Act presupposes a similar application thereof.

OSFC Holdings Ltd v The Queen⁸⁴ and Canada Trustco Mortgage Company v Canada⁸⁵ is regarded as the pioneer decisions with regards to section 245(4) of the Canadian Act. These two judgments will therefore be examined in order to explain the application of the misuse or abuse rule in the Canadian jurisprudence.

This exercise will then give a possible indication of how the misuse or abuse rule (also contained in section 80A(c)(ii) of the Act) will possibly be applied in South Africa. It will also serve an additional purpose: it will enable inferences to be made as to:

- whether the misuse or abuse rule mandates two different inquiries or not; and
- the interpretation of the phrase 'misuse or abuse'.

6.2 OSFC Holdings Ltd v The Queen

This is the first case in which the Federal Court of Appeal considered the application of section 245(4) of the Canadian Act.⁸⁶

⁸³ Olivier & Honiball 2008:405

⁸⁴ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA)

⁸⁵ Canada Trustco Mortgage company v Canada 2005 SSC 54

⁸⁶ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA) at paragraph 1

6.2.1 Application of the misuse or abuse rule

The Federal Court outlined a two-stage analytical process to answer the question of whether there is 'a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act ... read as a whole':⁸⁷

- The first stage involved identifying the policy
 - of the particular provisions of the Canadian Act that were relied upon to achieve the tax benefit; or
 - of the Canadian Act read as a whole.

The term 'policy', it was held, refers collectively to the purpose, object, spirit or scheme of the provisions, or the Canadian Act as a whole.⁸⁸

- The second stage involved the assessment of the facts to determine whether the avoidance transaction constituted
 - a misuse of the identified policy of the particular provisions of the Canadian Act; or
 - an abuse of the identified policy of the Canadian Act read as a whole.

The Court indicated that it is also necessary to bear in mind the context in which the misuse and abuse analysis is conducted. It was held that the avoidance transaction may comply with the letter of the applicable provisions of the Canadian Act but nonetheless constitute a misuse or abuse thereof.⁸⁹

⁸⁷ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA) at paragraph 59 & 67; see also Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 38

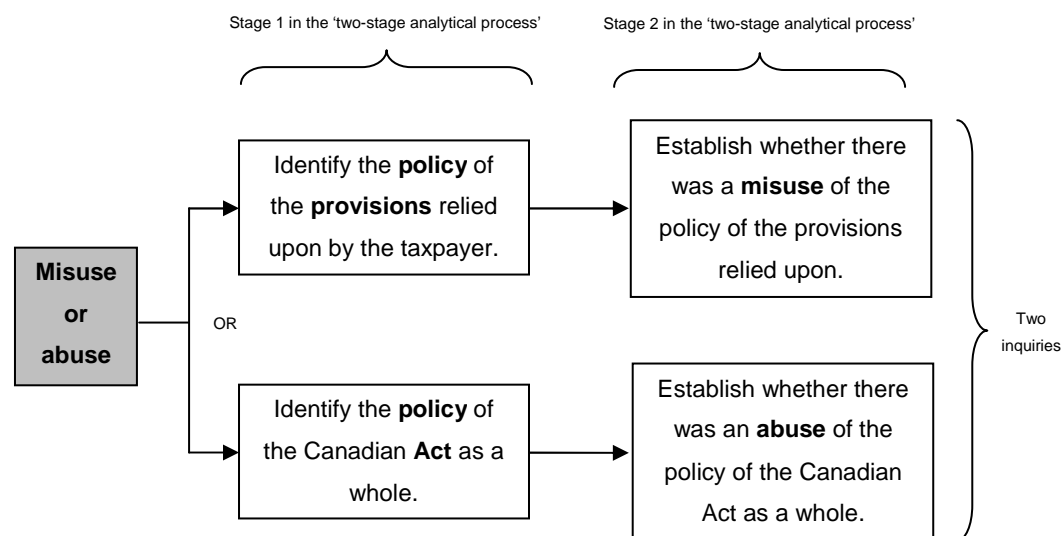
⁸⁸ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA) at paragraph 66

⁸⁹ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA) at paragraph 69

6.2.2 Misuse or abuse: two different inquiries?

From the above it is apparent that the Federal Court prescribed two inquiries in assessing for a misuse or abuse. See Figure 6.1.

Figure 6.1: Assessing for a misuse or abuse (OSFC Holdings)



6.2.3 Interpretation of the phrase 'misuse or abuse'

The Federal Court did not construe the meaning of the words 'misuse or abuse'. It did however indicate that section 245(4) will be applied if the avoidance transaction misuses or abuses the 'policy' (object, spirit or purpose) of the particular provisions or the Canadian Act read as a whole. Determining the purpose (of the particular provisions or the Canadian Act as a whole) is thus central to the inquiry as to what constitutes a 'misuse or abuse'. Such an inquiry is also fundamental to that prescribed by the draft version of section 80A(c)(ii) of the Act⁹⁰ and presumably also the enacted version thereof⁹¹.

⁹⁰ The draft version of section 80A(c)(ii) contains the phrase 'frustrate the purpose of any provision'.

⁹¹ In chapter 3 it was contented that an 'abuse' implies using a provision for a 'bad purpose'.

6.3 Canada Trustco Mortgage Company v Canada

This was the first decision in which the Supreme Court of Canada considered section 245 of the Canadian Act.⁹² This judgment is authoritative over that of OSFC Holdings Ltd v The Queen⁹³, as the latter was made by the Federal Court of Appeal. If the Supreme Court in Canada Trustco Mortgage Company v Canada⁹⁴ therefore alters a principle or approach prescribed by the Federal Court of Appeal in OSFC Holdings v The Queen, the principle or approach required by the Supreme Court will prevail.

6.3.1 Application of the misuse or abuse rule

The Supreme Court agreed with, in principle, the two-stage analytical process outlined in OSFC Holdings Ltd v The Queen.⁹⁵ This process, however, was amended to reflect a single inquiry in determining a misuse or abuse. The amended process was elaborated as follows:

- The first stage is to interpret the provisions, relied on by the taxpayer, giving rise to the tax benefit to determine their object, spirit and purpose.⁹⁶ This requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Canadian Act.⁹⁷
- The second stage is to determine whether the transaction frustrates or defeats the object, spirit or purpose of those provisions.⁹⁸

⁹² Duff 2006:54

⁹³ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA)

⁹⁴ Canada Trustco Mortgage company v Canada 2005 SSC 54

⁹⁵ Canada Trustco Mortgage company v Canada 2005 SSC 54 at paragraph 40

⁹⁶ Canada Trustco Mortgage company v Canada 2005 SSC 54 at paragraph 44

⁹⁷ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 47

⁹⁸ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 49

This process, it was argued, will lead to a finding of abusive tax avoidance when:

- a taxpayer relies on specific provisions of the Canadian Act in order to achieve an outcome that those provisions seek to prevent; or
- a transaction defeats the underlying rationale of the provisions that are relied upon; or
- an arrangement circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions.⁹⁹

By contrast, the Supreme Court indicated that an abuse is not established where an avoidance transaction was within the object, spirit or purpose of the provisions that confer the tax benefit.¹⁰⁰ The court also held that section 245 can only be applied to deny a tax benefit when the abusive nature of the transaction is clear.¹⁰¹ If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.¹⁰²

6.3.2 Misuse or abuse: two different inquiries?

The Supreme Court did not agree with the interpretation in *OSFC Holdings Ltd v The Queen*¹⁰³ in that the words ‘a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act ... read as a whole’ mandate two different inquiries. That interpretation, the court stated, raises the impossible question of how one can abuse the Canadian Act as a whole without misusing any of its provisions.¹⁰⁴

⁹⁹ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 45

¹⁰⁰ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 45

¹⁰¹ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 50

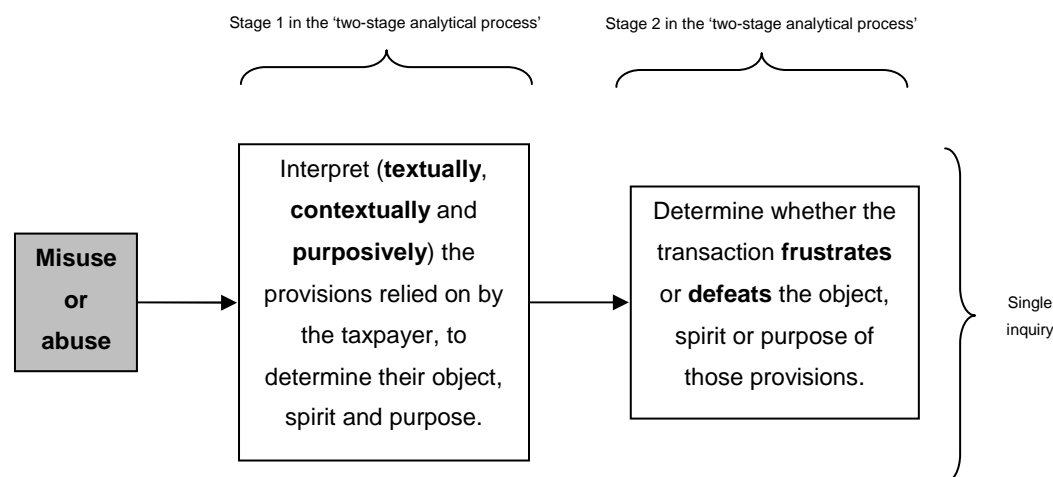
¹⁰² Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 66

¹⁰³ *OSFC Holdings Ltd v The Queen*, 2001 DTC 5471 (FCA) at paragraph 59 & 67

¹⁰⁴ Canada Trustco Mortgage company v Canada 2005 SSC 54 at paragraph 39

The Supreme Court held that the determinations of a misuse and abuse are not separate inquiries. It requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the Canadian Act that are relied upon by the taxpayer in order to determine whether there was abusive tax avoidance.¹⁰⁵ See Figure 6.2.

Figure 6.2: Assessing for a misuse or abuse (Canada Trustco)



6.3.3 Interpretation of the phrase 'misuse or abuse'

The Supreme Court indicated that the words 'misuse or abuse' imply 'frustrating' or 'defeating' the purpose of the provisions relied on by the taxpayer.¹⁰⁶ The contention furnished in chapter 3 is thus supported by the judgment in *Canada Trustco Mortgage Company v Canada*.¹⁰⁷ This could imply that the substitution of the phrase 'frustrate the purpose of any provision' (in the draft version) with the phrase 'misuse or abuse of the provisions' (in the enacted version) does in fact not result in a broader inquiry

¹⁰⁵ *Canada Trustco Mortgage company v Canada* 2005 SSC 54 at paragraph 43

¹⁰⁶ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54 at paragraph 45

¹⁰⁷ In chapter 3 it was contended that establishing whether the purpose of a provision has been violated is inherently imbedded in the linguistic nature of the word 'abuse'.

under section 80A(c)(ii) of the Act. The abuse of a provision, therefore, seems to be synonymous with frustrating the purpose of a provision.¹⁰⁸

6.4 Conclusion

A two stage analytical process was confirmed by the Supreme Court of Canada to elaborate on the application of the misuse or abuse rule, contained in section 245(4) of the Canadian Act:

- The first stage is to interpret the provisions, relied on by the taxpayer, to determine their object, spirit and purpose. This requires undertaking a contextual and purposive approach to interpretation in order to find the meaning that harmonizes the wording, object, spirit and purpose of the provisions.
- The second stage is to determine whether the transaction frustrates or defeats the object, spirit or purpose of those provisions.

It is submitted that this approach can also be used effectively in applying the misuse or abuse rule (contained in section 80A(c)(ii) of the Act) in the South African jurisprudence.

The Supreme Court of Canada determined that the misuse or abuse rule do not mandate two different inquiries. It requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the Canadian Act that are relied upon by the taxpayer, in order to determine whether there was abusive tax avoidance.

The investigation as to how the misuse or abuse rule is applied by the Canadian courts aided in explaining the meaning of the words 'misuse or

¹⁰⁸ This, however, is contrary to the presumption that 'where the legislature uses a different word or expression the strong inference is that this has been done designedly to provide for a different result' (De Koker 2007:9.6).

abuse'. It was established that these words can be construed as follows: frustrating or defeating the purpose of a provision. This meaning has a great amount of resemblance to that of the words in which the draft version of section 80A(c)(ii) was cast. If, therefore, the interpretation of a 'misuse or abuse' in Canadian case law is exactly what was intended by the South African legislature, this may imply that the substitution of the phrase 'frustrate the purpose of any provision' (in the draft version of section 80A(c)(ii)) with the phrase 'misuse or abuse of the provisions' (in the enacted version) does not have any significant effect.

Although a potential approach to the application of the misuse or abuse rule (contained in section 80A(c)(ii)) has been identified, the following issue still remains to be addressed: what is the possible effect of section 80A(c)(ii) on the South African jurisprudence? This issue will be addressed in two parts: chapter 7 will determine the effect that section 245(4) had on the Canadian jurisprudence as a preliminary to chapter 8, which will establish the possible effect section 80A(c)(ii) will have (if at all) on the South African jurisprudence.

CHAPTER 7
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CHAPTER 7

The effect of section 245(4) of the Canadian Act on statutory interpretation in Canada

7.1 Introduction

The first stage to the application of the misuse or abuse rule (contained in section 245(4)) requires that the provisions relied on by the taxpayer be interpreted contextually and purposively. Li and Picollo therefore made the following statement, with regards to the effect of section 245(4) on the approach to statutory interpretation in Canada:

‘In a sense, the GAAR has the effect of being a general rule of statutory interpretation. It would be difficult for judges to fall back on the strict interpretation or plain meaning with the GAAR in the Act.’¹⁰⁹

The approach to statutory interpretation in Canada will therefore be examined in order to determine the effect that section 245(4) had thereon. This will serve as an indication of the possible effect that section 80A(c)(ii) may have on the approach to statutory interpretation in South Africa. In order to aid the proposed exercise, it is necessary to briefly state the different approaches to statutory interpretation in common-law tradition. This is a useful starting point as it forms the foundation on which the subsequent discussion will be based.

7.2 The different approaches to statutory interpretation

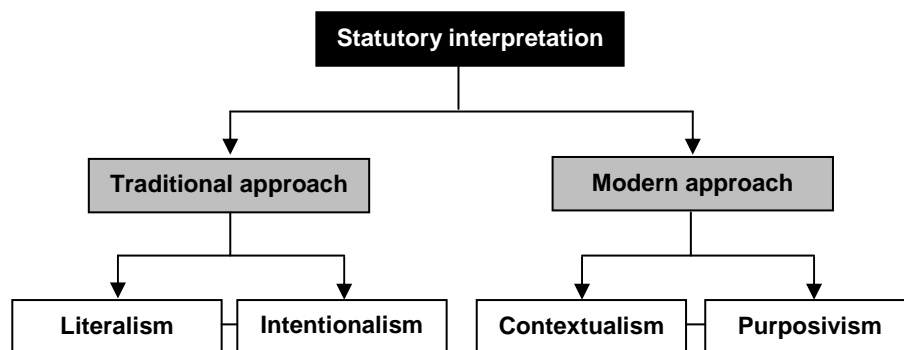
In common-law tradition there are two broad approaches to statutory interpretation: the traditional approach and the modern approach.¹¹⁰ Each of these approaches consists of two general theories to interpretation: literalism

¹⁰⁹ Li and Picollo 2007:43

¹¹⁰ SARS 2006:16

and intentionalism in the case of the traditional approach, and purposivism and contextualism in the case of the modern approach.¹¹¹ These theories are not mutually exclusive of one another; in many cases their application is intertwined. See Figure 7.1.

Figure 7.1: The approaches to statutory interpretation



7.2.1 The traditional approach

The traditional approach to the interpretation of statutes holds that the literal meaning of the wording of a provision must be ascertained by the use of ordinary grammatical rules. If the meaning of the words are clear then this meaning represents the intention of Parliament, the object of statutory interpretation always being to stamp a particular meaning with the Legislature's *iprimatur* by means of the fiction of Parliamentary intent.¹¹²

7.2.1.1 Literalism or Textualism

According to literalism the true meaning of a statutory provision is to be sought virtually exclusively in the very words used by the legislature.¹¹³ Adherence to the words of the provision must be given, regardless of

¹¹¹ Du Plessis 2002:93-98

¹¹² Emslie 1995:16

¹¹³ Devenish 1992:26

manifestly unjust or even absurd consequences.¹¹⁴ This approach to statutory interpretation was described by Lord Cairns in *Partington v The Attorney General*¹¹⁵ at page 375:

‘If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be.’

7.2.1.2 Intentionalism

Intentionalism (also referred to as the subjective theory) holds that the meaning of a statutory provision is governed by what the legislature intended as disclosed by the wording of the provision.¹¹⁶ This implies that the real intention of the legislature, once discerned, must be given effect to.¹¹⁷ The theory is based on the distinction between language on the one hand, and ideas and thought on the other. It does not assume that the expressed intention is equivalent to the authentic intention of the legislature.¹¹⁸

7.2.2 The modern approach

Emslie holds the view that the traditional approach to the interpretation of statutes is at best a convenient fiction: it is naïve to believe that statutes can be interpreted literally. He states that linguistic philosophers such as Wittengenstein have pointed out that words, sentences and texts can never have meaning in themselves: they are used in the context of a complex of tacitly understood rules, and it is only within this context that they have

¹¹⁴ Joubert & Faris 2001:282

¹¹⁵ *Partington v The Attorney General* 21 LR 370

¹¹⁶ Kellaway 1995:63

¹¹⁷ Du Plessis 2002: 94

¹¹⁸ Devenish 1992:33

meaning.¹¹⁹ The modern approach attributes meaning to a statutory provision in the light of the purpose that it seeks to achieve by looking at it in context.

7.2.2.1 Purposivism

Purposivism attributes meaning to a statutory provision in the light of the purpose that it seeks to achieve.¹²⁰ Legislative purpose is a more general and much more objective concept than that of legislative intent.¹²¹ This approach has been described by Lord Denning in *James Buchanan & Co Ltd v Baco Forwarding and Shipping (UK) Ltd*¹²² at page 522-523:

‘It means... that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it.’

7.2.2.2 Contextualism

This theory is often advanced as the interpretive twin of purposivism¹²³, the argument being that the purpose of a provision can only be ascertained by looking at it in context.¹²⁴ The meaning of a provision is often said to be determinable by reading its words in context or reading the language in context or reading the provision itself in context.¹²⁵

¹¹⁹ Emslie 1995:16

¹²⁰ Joubert & Faris 2001:285

¹²¹ Devenish 1992:35

¹²² *James Buchanan & Co Ltd v Baco Forwarding and Shipping (UK) Ltd* [1977] 1 All ER 518

¹²³ I.e. contextualism and purposivism go hand in hand.

¹²⁴ Du Plessis 2002:97

¹²⁵ Joubert & Faris 2001:297

7.2.3 Conclusion

There are two broad approaches to statutory interpretation:

- The first is termed the traditional approach which demands the application of the literalism theory (adherence to the strict words of the legislation) and/or the intentionalism theory (adherence to the intention of the legislature).
- The second is termed the modern approach which demands the application of the purposivism theory (adherence to the purpose of the legislation) and/or contextualism (adherence to the purpose of the legislation in context).

7.3 The approach to statutory interpretation in Canada

The approach to statutory interpretation in Canada will be evaluated (chronologically) in two parts. The first part will determine the approach employed before the application of section 245(4). The second part will determine the approach employed since the application of section 245(4). This will aid in isolating the effect that section 245(4) had on the Canadian courts approach to the interpretation of statutes.

7.3.1 Pre application of section 245(4)

7.3.1.1 Partington v The Attorney General

Traditionally, Canadian courts interpreted tax statutes strictly (literally).¹²⁶ The dictum of Lord Cairns in *Partington v The Attorney General*¹²⁷ was accordingly adopted.

¹²⁶ Li & Picollo 2007:4

¹²⁷ *Partington v The Attorney General* 21 LT 370 at page 375

7.3.1.2 Stubart Investments Ltd v The Queen

In the late 1970's Canadian courts started to move away from the literal approach. This move away from the literal approach gained momentum with the rise of the 'modern rule' to statutory interpretation.¹²⁸ This rule was formulated in *Stubart Investments Ltd v The Queen*¹²⁹ at page 578:

'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.'

The modern rule requires an examination of the meaning of the words used in the statute, the context of the provision within the statute, the scheme and object of the statute, and the legislative intent.

7.3.1.3 Antosko v The Queen

In the early 1990's the modern rule continued to be cited, but its impact was reduced significantly by the court in *Antosko v The Queen*¹³⁰ whom revived the literal approach to statutory interpretation. The court stated at paragraph 29:

'While it is true that the courts must view discrete sections of the Income Tax Act in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed...'

¹²⁸ Li & Picollo 2007:4

¹²⁹ *Stubart Investments Ltd. v The Queen* [1984] 1 S.C.R. 536

¹³⁰ *Antosko v The Queen* [1994] 2 C.T.C. 25, 94 D.T.C 6314 (S.C.C)

7.3.1.4 Friesen v R

In *Friesen v R*¹³¹ the court confirmed its move away from the modern approach when it stated at paragraph 17:

‘When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.’

The court in *Friesen v R*¹³² required the following approach to statutory interpretation: find the plain meaning of the statutory text first; only if that exercise fails in establishing an unambiguous interpretation may the court examine the object or purpose of the statutory provision.¹³³

7.3.1.5 Conclusion

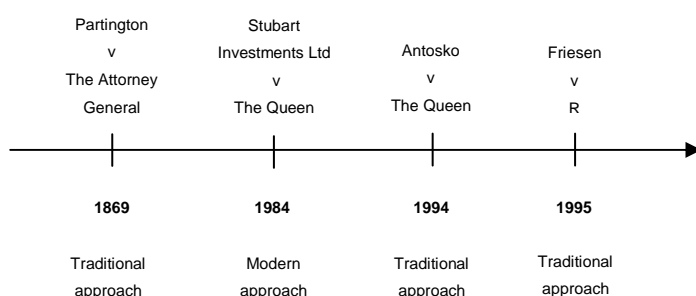
The approach to statutory interpretation employed by the Canadian courts, before the application of section 245(4), varied between the traditional approach and the modern approach, with the former prevailing in the mid 1990’s. This finding is summarized in Figure 7.2.

¹³¹ *Friesen v. R* [1995] 2 C.T.C 369, 95 D.T.C. 5551 (S.C.C)

¹³² *Friesen v. R* [1995] 2 C.T.C 369, 95 D.T.C. 5551 (S.C.C)

¹³³ Li & Picollo 2007:6

Figure 7.2: Approach to statutory interpretation in Canada before the application of section 245(4)



7.3.2 Post application of section 245(4)

7.3.2.1 OSFC Holdings Ltd v The Queen

OSFC Holdings Ltd v The Queen¹³⁴ was the first case in which the court was able to analyze section 245 (the Canadian GAAR). In applying this section, the court revived the application of the modern approach to statutory interpretation at paragraph 65:

‘Determining whether a particular provision of the Act has been misused, or whether the Act read as a whole has been abused, requires an examination of the purpose (‘object and spirit’) of the particular provision or scheme of provisions. It is not sufficient merely to rely on the technical language of the particular provision or scheme of provisions to determine whether there has been a misuse of the Act or an abuse of the Act read as a whole.’

7.3.2.2 Canada Trustco Mortgage Company v Canada

In Canada Trustco Mortgage Company v Canada¹³⁵ the court conferred the modern approach to statutory interpretation at paragraph 10:

¹³⁴ OSFC Holdings Ltd v The Queen 2001 DTC 5471 (FCA)

¹³⁵ Canada Trustco Mortgage Company v Canada 2005 SSC 54

'It has been long established as a matter of statutory interpretation that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole.'

7.3.2.3 Mathew v Canada

In *Mathew v Canada*¹³⁶ the Court continued to apply the modern approach. The following was stated at paragraph 43 of the judgment:

'While it is useful to consider the three elements of statutory interpretation separately to ensure each has received its due, they inevitably intertwine. For example, statutory context involves consideration of the purposes and policy of the provisions examined. And while factors indicating legislative purpose are usefully examined individually, legislative purpose is at the same time the ultimate issue...'

7.3.2.4 Placer Dome Canada Ltd v Ontario

Although the 'modern rule' of statutory interpretation was restated as the 'textual, contextual and purposive' approach, it was unclear whether this approach would apply outside the GAAR context.¹³⁷ In *Placer Dome Canada Ltd v Ontario*¹³⁸ the court made it clear that the 'textual, contextual and purposive' approach was not confined to GAAR context, and applied to tax

¹³⁶ *Mathew v Canada* 2005 SCC 55

¹³⁷ *Li & Picollo* 2007:12

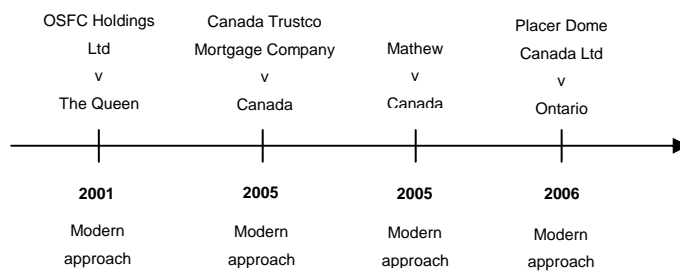
¹³⁸ *Placer Dome Canada Ltd v Ontario (Minister of Finance)* 2006 SCC 20

statutes in general.¹³⁹ Li & Picollo comments that this came naturally as the GAAR is potentially applicable to many provisions of the Act and it would have been very odd to switch the interpretative approach depending on whether the GAAR is invoked or not.¹⁴⁰

7.3.2.5 Conclusion

The Canadian courts, since the application of section 245(4), favoured a modern approach to the interpretation of statutes. See Figure 7.3.

Figure 7.3: Approach to statutory interpretation in Canada since the application of section 245(4)



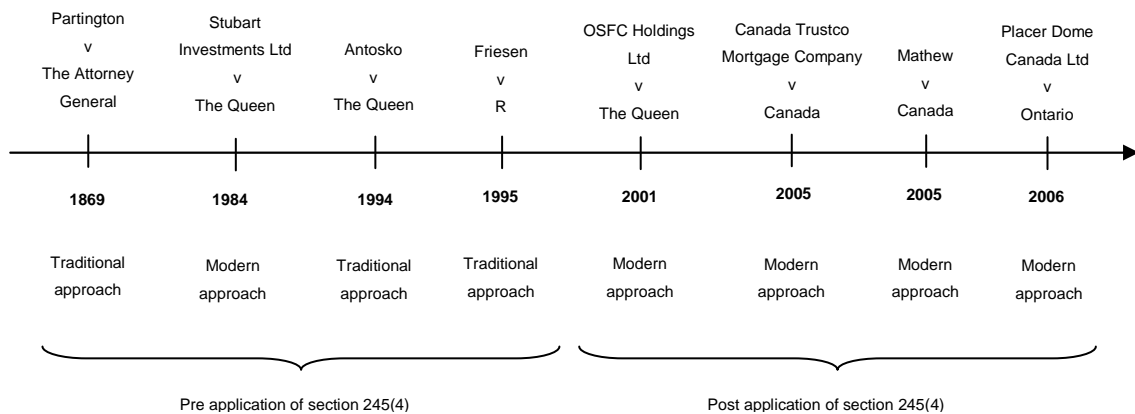
7.4 Conclusion

Section 245(4) of the Canadian Income Tax Act sparked a revival of the modern approach to statutory interpretation in Canada. It persuaded the Canadian court to convert from interpreting statutes in a literal manner (traditional approach) to interpreting statutes in a unified textual, contextual and purposive manner (modern approach). See Figure 7.4.

¹³⁹ Li & Picollo 2007:2

¹⁴⁰ Li & Picollo 2007:43

Figure 7.4: Approach to statutory interpretation by the Canadian courts



Li and Picollo therefore notes that section 245(4) of the Canadian Act could, in a sense, be viewed as a statutory interpreting rule to codify the modern approach.¹⁴¹ The concept of a misuse or abuse of the provisions, it is submitted, is thus really a matter of statutory interpretation.

Having determined the effect of section 245(4) of the Canadian Act on the jurisprudence in Canada, i.e. a move towards the modern approach to statutory interpretation, it is now necessary to examine the possible effect (if any) section 80A(c)(ii) of the Act may have on statutory interpretation in South Africa. This is the issue addressed in chapter 8.

¹⁴¹ Li & Picollo 2007:8

CHAPTER 8
The proposed effect of section 80A(c)(ii) of the Act on statutory
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CHAPTER 8

The proposed effect of section 80A(c)(ii) of the Act on statutory interpretation in South Africa

8.1 Introduction

In Chapter 7 it was determined that a modern approach to statutory interpretation is central to the inquiry under section 245(4) of the Canadian Act. It seems that such an approach to statutory interpretation was the SARS' rationale¹⁴² behind the introduction of section 80A(c)(ii) of the Act:

'Financial and commercial markets are becoming increasingly complex and the rate of change shows no sign of abating. Throughout the world, tax laws have been forced to follow suit and have increased in both length and complexity in order to cope with this rapidly changing environment. At times, the traditional "literal" approach to the interpretation of tax statutes has worsened the problem. As a result, there has been a broad movement towards the so-called "modern" approach to the interpretation which requires a "contextual and purposive approach ... in order to find the meaning that harmonizes the wording, subject, spirit and purpose of the provisions of the [tax laws].'" The proposed Element is intended to reinforce this emerging trend in South Africa.'¹⁴³

The above passage portrays the possibility that a traditional approach to statutory interpretation is followed in South Africa. If this is the case, then, it is submitted, section 80A(c)(ii) will play a similar role to that of its Canadian counterpart (section 245(4) of the Canadian Act): a move towards the

¹⁴² The cited rationale relates to the draft version of section 80A(c)(ii). This, however, is the only rationale furnished by SARS for section 80A(c)(ii).

¹⁴³ SARS 2006:15

modern approach to statutory interpretation.¹⁴⁴ If, however, a modern approach to statutory interpretation is already followed in South Africa, it is submitted, section 80A(c)(ii) will add nothing to our law, and can thus have no effect.

This chapter aims at determining the approach to statutory interpretation in South Africa. This is a crucial step in determining the possible effect (if at all) that section 80A(c)(ii) of the Act will have on the approach to statutory interpretation in South Africa. A convenient starting point will be to examine the opinion of several tax scholars in South Africa.

8.2 The opinion of several tax scholars in South Africa

8.2.1 Broomberg

According to this scholar the interpretation of tax laws in South Africa is anchored in a pure textual theory, as articulated by Rowlatt J in *Cape Brandy Syndicate v IRC*¹⁴⁵. He states the following:

‘In other words, in South Africa, when the meaning of the words of the Income Tax Act is clear and unambiguous, the Court has to stop at the first step. The application of a purposive interpretation is impermissible.’¹⁴⁶

Broomberg is thus of belief that a traditional approach to statutory interpretation must be followed in South Africa.

¹⁴⁴ Cilliers (2006:186), when commenting on the draft version of section 80A(c)(ii), states the following: ‘It is submitted that a provision like section 80A(c)(ii) would make sense, and might even be necessary, in a legal system where the prevailing method of interpretation is die-hard literalism.’

¹⁴⁵ *Cape Brandy Syndicate v IRC* (1921) 1 KB 64 at page 71

¹⁴⁶ Broomberg 2007:9

8.2.2 Clegg & Stretch

These two scholars argue that the approach to the interpretation of statutes is encapsulated in the dictum of Lord Cairns in *Partington v Attorney General*¹⁴⁷. They state the following:

‘... if the wording of a provision is absolutely clear, it must be applied ‘however great the hardship may appear to the judicial mind to be’. Only where there is ambiguity would a court look to the supposed intention of the legislature in a contextual sense, to interpret the provision.’¹⁴⁸

Clegg and Stretch is accordingly also of opinion that a traditional approach to statutory interpretation is followed.

8.2.3 Louw

This scholar shares a similar opinion to that of Broomberg:

‘The so-called ‘textual, contextual and purposive’ method of interpretation stands in sharp contrast with South African jurisprudence, which mostly relates to the ‘textual’ meaning. The dictum of Rowlatt J in *Cape Brandy Syndicate v IRC* stating that ‘It simply means that in a taxing Act one has to look at what is clearly said. There is no room for any intendment ... One can only look fairly at the language used’ makes it clear...’¹⁴⁹

Louw is therefore also of view that a traditional approach to statutory interpretation is followed in South Africa.

¹⁴⁷ *Partington v The Attorney General* 21 LT 370 at page 375

¹⁴⁸ Clegg & Stretch 2007:26.3.5

¹⁴⁹ Louw 2007:40

8.2.4 Olivier & Honiball

These two scholars show strong support for the approach to statutory interpretation prescribed in *Venter v Rex*¹⁵⁰. They state the following:

‘... the purposive approach to interpretation of tax statutes is completely foreign to South African tax law. The so-called ‘golden rule’ of interpretation which is followed in South Africa, is that the intention of the legislature is sought in the words used (the so-called ‘literal approach’). The only time this approach is deviated from is when the words used are not clear.’¹⁵¹

Olivier and Honiball contend that a traditional approach to statutory interpretation is followed in South Africa.

8.2.5 Conclusion

Based on the opinion of the above mentioned tax scholars, it appears as if South Africa applies a traditional approach to statutory interpretation. A comprehensive investigation will now be made into the approach of the South African courts to the interpretation of statutes. The result will either support the stated contentions or contradict it.

8.3 The approach to statutory interpretation in South-Africa

The approach to statutory interpretation by the South African courts will be evaluated (chronologically) on a pre Constitutional and post Constitutional level. The enactment of the Constitution in 1996, as will later be revealed, had far-reaching authoritative implications to statutory interpretation. The rationale behind the proposed method of evaluation is to emphasise the

¹⁵⁰ *Venter v Rex* 1907 TC 910 at page 914

¹⁵¹ Olivier & Honiball 2008:405

practical effect (if any) the Constitution had on statutory interpretation in South Africa.

It should be noted that the majority of cases analyzed for this evaluation do not relate to fiscal legislation. Due allowance should however be given to the following dictum by Botha JA in *Glen Anil Development Corporation Ltd v SIR*¹⁵² at page 727:

‘... there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation.’

8.3.1 The pre Constitution era

8.3.1.1 Partington v The Attorney General

The literal theory, articulated in the dictum of Lord Cairns in *Partington v The Attorney General*¹⁵³, has been repeatedly referred to by the South African courts. A traditional approach to statutory interpretation was thus applied.

8.3.1.2 Venter v Rex

*Venter v Rex*¹⁵⁴ is regarded as the *locus classicus* insofar as the approach to interpretation of statutes by the courts in South Africa is concerned.¹⁵⁵ The golden rule of statutory interpretation was formulated by Innes CJ at page 914:

¹⁵² *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A)

¹⁵³ *Partington v The Attorney General* 21 LT 370 at page 375

¹⁵⁴ *Venter v Rex* 1907 TC 910

¹⁵⁵ *De Ville* 2000:51

‘.... when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.’

The golden rule to statutory interpretation is termed a literalism-cum-intentionalism theory: an alliance of the ordinary meaning of the words and the intention of the legislature.¹⁵⁶ The rule requires adherence to the ‘plain words’ of a statute unless this would lead to an absurdity or to a result contrary to the intention of the legislature. A court may in such instance depart from the literal meaning of a provision in an attempt to eliminate the absurdity or to give effect to the true intention of the legislature.¹⁵⁷ *Venter v Rex*¹⁵⁸ thus prescribed a traditional approach to statutory interpretation.

This case, however, left an opportunity for a mode of statutory interpretation that takes proper account of the context in which a provision is set.¹⁵⁹ The words –

‘... as shown by the context or by such other considerations as the Court is justified in taking into account...’

serves as authority for such an assertion. This opportunity was only seized upon some decades later in the minority judgment of *Jaga v Dönges, N.O.*¹⁶⁰.

¹⁵⁶ Du Plessis 2001:107

¹⁵⁷ Joubert & Faris 2001:290

¹⁵⁸ *Venter v Rex* 1907 TC 910

¹⁵⁹ Du Plessis 2002:108

¹⁶⁰ *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653 at page 664

8.3.1.3 Cape Brandy Syndicate v IRC

A passage that has often been cited by the courts is the following dictum by Rowlatt J in *Cape Brandy Syndicate v IRC*¹⁶¹ at page 71:

‘In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.’

This implies that when the statute is expressed in clear, precise and unambiguous words, the court must give effect to the words only.¹⁶² This court thus required a traditional approach to statutory interpretation.

8.3.1.4 CIR v Delfos

Statutory interpretation received a flavour of intentionalism in *CIR v Delfos*¹⁶³. After referring to the literal theory stated by Lord Cairns in *Partington v Attorney General*¹⁶⁴, Botha JA went on to say at page 254:

‘I do not understand this to mean that in no case in a taxing Act are we to give to a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the legislature.’

An approach to ascertain and apply the legislature’s intention when adhering to the words of a provision was thus required. This judgment, it is submitted, draws on the literalism-cum-intentionalism theory prescribed in *Venter v Rex*¹⁶⁵. It thus applied a traditional approach to statutory interpretation.

¹⁶¹ *Cape Brandy Syndicate v IRC* (1921) 1 KB 64

¹⁶² Broomberg 2007:9

¹⁶³ *CIR v Delfos* 1933 AD 242

¹⁶⁴ *Partington v The Attorney General* 21 LT 370 at page 375

¹⁶⁵ *Venter v Rex* 1907 TC 910 at page 914

8.3.1.5 Jaga v Dönges, N.O

The above mentioned opportunity in *Venter v Rex*¹⁶⁶, i.e. applying a contextual theory, was not seized upon until the landmark minority judgement in *Jaga v Dönges, N.O*¹⁶⁷. Schreiner JA stated the following at page 662:

‘Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context.’

Schreiner JA then went on and indicated that context refers not only to the language of the rest of the statute, but also to its matter, purpose, scope and background. He stated at page 662:

‘... ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.’

Schreiner JA indicated that the relevance of context allows for two possible avenues of approach.¹⁶⁸ The first avenue (qualified contextual approach) entails concentrating on the ‘clear ordinary meaning’ of the language and refers to the context only in instances where the language is ambiguous. According to the second avenue (unqualified contextual approach) context and language are taken together right from the start.¹⁶⁹ He stated at page 662 to 663:

¹⁶⁶ *Venter v Rex* 1907 TC 910 at page 914

¹⁶⁷ *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653

¹⁶⁸ Joubert & Faris 2001:297

¹⁶⁹ Devenish 1992:58

‘The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.’

According to Du Plessis, the following dictum by Schreiner JA (at page 664) intimates preference for the second avenue:¹⁷⁰

‘But the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.’

The minority in *Jaga v Dönges, N.O* thus prescribed a modern approach to statutory interpretation. As this was the opinion of the minority, it was not regarded as authoritative. However, the view of Schreiner JA (as will be revealed) has met with success in several subsequent cases.

8.3.1.6 Stellenbosch Farmers’ Winery Ltd v Distillers Corporation (SA) Ltd

In the judgment by Wessels AJA in *Stellenbosch Farmers’ Winery Ltd v Distillers Corporation (SA) Ltd*¹⁷¹ the words of Schreiner JA in *Jaga v Donges N.O*¹⁷² echoes in the background. Wessels AJA required the court to strike a balance between context and language when reading a provision which requires interpretation. He stated at page 476:

¹⁷⁰ Du Plessis 2002:114

¹⁷¹ *Stellenbosch Farmers’ Winery Ltd v Distillers Corporation (SA) Ltd* 1962 1 SA 458 (A)

¹⁷² *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653 at page 662

‘In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the ‘matter of the statute, its apparent scope and purpose, and, within limits, its background.’ In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.’

The court thus required that the language be read in context i.e. in its setting. This implies the application of the modern approach to statutory interpretation.

8.3.1.7 Rossouw v Sachs¹⁷³

In this case the Appellate Division required that the Court should examine the wording of a provision in its context and according to its purpose. Ogilvie Thompson AJ stated the following at page 563 to 564:

‘I accordingly conclude that in interpreting sec. 17 this Court should accord preference neither to the ‘strict construction’ ... nor to the ‘strained construction’ ..., but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object.’

This court thus prescribed the combined application of both the contextual and purposive theory. This implies the application of the modern approach to statutory interpretation.

¹⁷³ Rossouw v Sachs 1964 (2) SA 551

8.3.1.8 SIR v Sturrock Sugar Farm (Pty) Ltd¹⁷⁴

In delivering his judgment, Ogilvie Thompson AJ referred to the dictum by Schreiner JA in *Jaga v Donges N.O.*¹⁷⁵. He then negated ambiguity as a requirement for the consideration of the context and purpose of a statutory provision. He stated at page 903:

‘Even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction.’

The court thus required the joint application of both the contextual and purposive theory. The modern approach was thus sanctioned.

8.3.1.9 SIR v Brey¹⁷⁶

Here Rumpff CJ required the court to look at the words, its context and its purpose when analyzing a statutory provision. He stated at page 478:

‘For purposes of ascertaining the meaning of words in a legal document like a contract, a will or a statute, a Court never looks at the words in stark isolation. It looks at the words in their setting, at the context in which the words are used and at the purpose for which the words are intended.’

This court required the simultaneous application of both the contextual and purposive theory. This entails applying a modern approach to statutory interpretation.

¹⁷⁴ *SIR v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A)

¹⁷⁵ *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653 at page 664

¹⁷⁶ *SIR v Brey* 1980 1 SA 472 (A)

8.3.1.10 UCT v Cape Bar Council¹⁷⁷

Upon delivering his judgment Rabie CJ gave sanction to an unqualified contextual approach in regard to the external aid of surrounding circumstances.¹⁷⁸ After citing the dictum of Schreiner JA in *Jaga v Dönges*, N.O.¹⁷⁹ he stated the following at page 914:

‘I am of the opinion that the words ..., clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature.’

Reading a provision in the light of its subject-matter implies adopting a purposive theory. The modern approach to statutory interpretation was thus approved of.

8.3.1.11 Conclusion

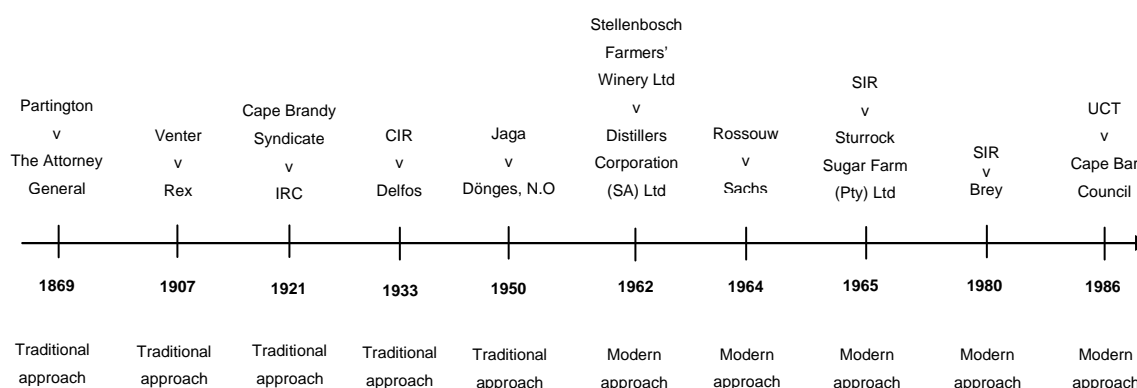
The pre Constitutional approach to statutory interpretation in South Africa, it is submitted, evolved from a traditional approach (late 1800's) to a modern approach (mid 1900's). This is illustrated by Figure 8.1.

¹⁷⁷ *University of Cape Town v Cape Bar Council* 1986 (4) 903

¹⁷⁸ *Devenish* 1992:59

¹⁷⁹ *Jaga v Dönges*, N.O. and Another; *Bhana v Dönges*, N.O. and Another 1950(4) SA 653 at page 662-663

Figure 8.1: Approach to statutory interpretation in the pre Constitution era



Without considering the effect of the Constitution, it seems therefore that a modern approach (as prescribed by the application of section 245(4) of the Canadian Act, and presumably therefore also section 80A(c)(ii) of the Act) was already authoritative in South Africa.

8.3.2 The post Constitution era

The Constitution of the Republic of South Africa was promulgated in 1993 and enacted in 1996. Section 1, 2 and 8 of the Constitution of the Republic of South Africa, 1996, indicates that the Constitution is superior to all other legislation. With regards to constitutional and statutory interpretation section 39(1) and (2) states the following:

‘39. Interpretation of Bill of Rights.

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Subsections (1) and (2) of section 39 of the Constitution, command a similar interpretative approach to both the Constitution and Statutes. Constitutional interpretation thus, in effect, determines and shapes statutory interpretation.¹⁸⁰

According to De Ville the Constitution requires statutory interpretation to be established by following a broad contextual approach. The context within which the statute is interpreted should include the constitutional values, the statute's background, its purpose (viewed in the light of the aims of the Constitution), other statutes as well as the social, political and economic context and (where relevant) comparative and international law.¹⁸¹

The Constitution, it is submitted, therefore provides a sovereign authority for the application of the modern approach to statutory interpretation. Nevertheless, case law following the enactment of the Constitution will be examined in an attempt to confirm the application of the modern approach.

8.3.2.1 S v Makwanyane

The judgment of Schreiner JA in *Jaga v Dönges*, N.O.¹⁸² has met with approval in constitutional jurisprudence. In *S v Makwanyane*¹⁸³ Chaskalson P stated at paragraph 10:

'I need say no more in this judgment than that section 11(2) of the Constitution must not be construed in isolation, but in its context, which

¹⁸⁰ Du Plessis 2002:133

¹⁸¹ De Ville 2000:62

¹⁸² *Jaga v Dönges*, N.O. and Another; *Bhana v Dönges*, N.O. and Another 1950(4) SA 653 at page 662-664

¹⁸³ *S v Makwanyane* 1995 6 BCLR 665 (CC)

includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part.'

Reading a provision in its context implies adopting a contextual theory. The Constitutional Court thus prescribed a modern approach to statutory interpretation.

8.3.2.2 Fundstrust (Pty) Ltd (In liquidation) v Van Deventer

In *Fundstrust (Pty) Ltd (In liquidation) v Van Deventer*¹⁸⁴ the words of Schreiner JA in *Jaga v Donges NO*¹⁸⁵ again emerges. In his judgment, Hefer JA stated the following at page 726 to 727:

'But judicial interpretation cannot be undertaken... by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. The task of the interpreter is, after all to ascertain the meaning of a word or expression in the particular context of the statute in which it appears.'

Reference to the contextual scene of a provision implies adopting a modern approach to statutory interpretation.

8.3.2.3 ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd

It has also been emphasised in *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd*¹⁸⁶ that the context, including the purpose of a provision and the object of a statute as a whole, can show or furnish grounds for not reading a provision literally.¹⁸⁷ Marais JA stated at paragraph 29:

¹⁸⁴ *Fundstrust (Pty) Ltd (In liquidation) v Van Deventer* 1997 (1) SA 710 (A)

¹⁸⁵ *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653 at page 664

¹⁸⁶ *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 3 SA 924 (SCA)

¹⁸⁷ Joubert & Faris 2000: 291

‘One is thrown back upon the ordinary meaning of the words used with due regard to their context, the apparent purpose of the provision in which they are found and, of course, to their setting in, and the object of, the statute as a whole.’

This court prescribed a contextual and purposive theory to statutory interpretation. A modern approach to statutory interpretation was thus required.

8.3.2.4 Minister of Land Affairs and Another v Slamdien and Others

Section 39(2) of the Constitution seemingly prescribes a purposive theory for the interpretation of all statutes.¹⁸⁸ In *Minister of Land Affairs and Another v Slamdien and Others*¹⁸⁹ Dodson J stated at paragraph 13:

‘Even though the law of statutory interpretation has not wholeheartedly adopted a purposive approach, it seems to me that where one is dealing with a statute which the Constitution specifically requires to be enacted in order to give content to the right concerned, it would be absurd to adopt a different approach to the statute’s interpretation.’

By prescribing a purposive theory to the interpretation of statutes the Constitutional Court thus, again, sanctioned a modern approach to statutory interpretation.

¹⁸⁸ De Ville 2000:249

¹⁸⁹ *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC)

8.3.2.5 Stopforth v Minister of Justice and Others; Veenendal v Minister of Justice and Others

In *Stopforth v Minister of Justice and Others; Veenendal v Minister of Justice and Others*¹⁹⁰, Olivier JA applied a purposive approach to the interpretation of statutes. He confirmed the dictum by Ogilvie Thompson JA in *SIR v Sturrock Sugar Farm (Pty) Ltd*¹⁹¹. Olivier JA then indicated that the golden rule formulated in *Venter v Rex 1907*¹⁹² by Innes CJ allows for such a purposive approach to statutory interpretation. With regards to this approach he indicated at paragraph 21 that one should, at least –

- ‘(i) look at the preamble of the Act or at other express indications in the Act as to the object that has to be achieved;
- (ii) study the various sections wherein the purpose may be found;
- (iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);
- (iv) draw logical inferences from the context of the enactment.’

Olivier JA required adherence to the purpose and the context of a provision when interpreting statutes. He thus called for a modern approach to statutory interpretation.

8.3.2.6 De Beers Marine (Pty) Ltd v CSARS

In *De Beers Marine (Pty) Ltd v CSARS*¹⁹³ Nienaber JA emphasised the cardinal importance of the context in which the words or phrases are used when interpreting fiscal legislation. He held at paragraph 7:

¹⁹⁰ *Stopforth v Minister of Justice and Others; Veenendal v Minister of Justice and Others* 2000 1 SA 113 (SCA)

¹⁹¹ *SIR v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) at page 903

¹⁹² *Venter v Rex 1907* TS 910 at page 914

¹⁹³ *De Beers Marine (Pty) Ltd v Commissioner for SARS* [2002] 3 All SA 181 (A)

‘Export’ in section 20(4) of the Customs Act must in my opinion take its colour, like a chameleon, from its setting and surrounds in the Act.’

Reading a provision in context or ‘from its setting and surrounds’ entails applying a modern approach to statutory interpretation.

8.3.2.7 Standard General Insurance Company Ltd v CCE

In *Standard General Insurance Company Ltd v CCE*¹⁹⁴ Nugent and Lewis JJA referenced the dictum of Schreiner JA in *Jaga v Dönges, N.O.*¹⁹⁵ and Nienaber JA in *De Beers Marine (Pty) Ltd v CSARS*¹⁹⁶ as authority for their following statement at paragraph 25:

‘Rather than attempting to draw inferences as to the drafter’s intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. ... the word must ‘take its colour, like a chameleon, from its setting and surrounds in the Act’.’

Nugent and Lewis JJA investigate into the purpose of the legislation as opposed to the intention of the legislator. This purpose is sought with reference to the context in which the provision is set. A modern approach to statutory interpretation is thus applied.

¹⁹⁴ *Standard General Insurance Company Ltd v Commissioner for Customs and Excise* [2004] 2 All SA 376 (SCA)

¹⁹⁵ *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950(4) SA 653 at page 662

¹⁹⁶ *De Beers Marine (Pty) Ltd v Commissioner for SARS* [2002] 3 All SA 181 (A) at paragraph

8.3.2.8 CSARS v Airworld CC and another

In *CSARS v Airworld CC and another*¹⁹⁷ Hurt AJA favoured a purposive construction to fiscal legislation. As authority for this view he cited the dictum of Nugent and Lewis JJA in *Standard General Insurance Company Ltd v CCE*¹⁹⁸. He stated at paragraph 25:

‘Most of the rules of interpretation have been devised for the purpose of resolving apparent ambiguity and arriving at an interpretation which accord as well as possible both with the language which the Legislature has used and with the apparent intention with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator’s intention.’

Hurt AJA thus prescribed a modern approach to statutory interpretation.

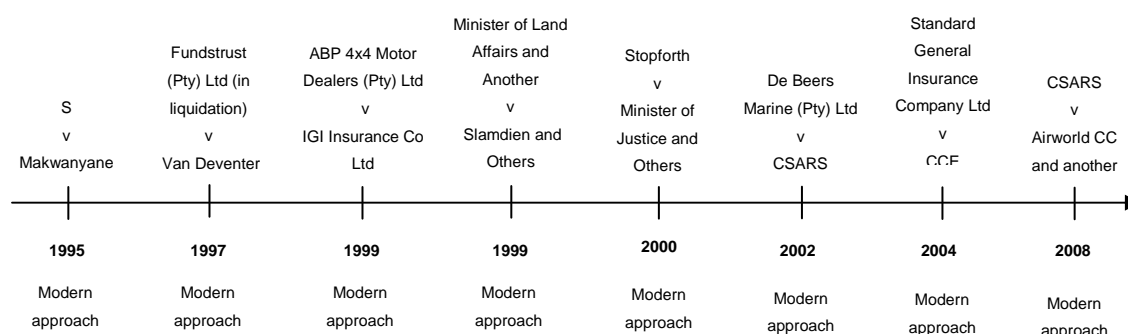
8.3.2.9 Conclusion

The modern approach to statutory interpretation has continually been applied in the era succeeding the enactment of the Constitution. This is illustrated by Figure 8.2.

¹⁹⁷ *CSARS v Airworld CC and another* [2008] 2 All SA 593 (SCA)

¹⁹⁸ *Standard General Insurance Company Ltd v Commissioner for Customs and Excise* [2004] 2 All SA 376 (SCA) at paragraph 25

Figure 8.2: Approach to statutory interpretation in the post Constitution era



This finding, however, is only a continuation of the approach applied in the era immediately preceding the enactment of the Constitution.¹⁹⁹ It seems therefore that the Constitution, in itself, did not have a significant effect on the approach to statutory interpretation, except for providing a sovereign authority for its application.

8.4 Other considerations

The modern approach to statutory interpretation, it is submitted, is also inherently embedded in our legislation:

- The definition section of the Act (section 1) contains a proviso: ‘unless the context otherwise indicates’.

Regard has therefore to be given to the context within which the word appears. The definition section is thus, it is submitted, a codification of the modern approach.

8.5 Conclusion

The modern approach to statutory interpretation was already operative in the latter part of the era preceding the enactment of the Constitution, and continually applied since. It seems therefore that the effect of section 245(4)

¹⁹⁹ See 8.3.1.11

of the Canadian Act on the jurisprudence in Canada, i.e. a move from the traditional approach to the modern approach, will not be attainable by section 80A(c)(ii) of the Act. If this was the effect sought after by its enactment, it is submitted that section 80A(c)(ii) of the Act will add nothing to our law.

Section 80A(c)(ii) of the Act, it is submitted, will do no more than enshrine an approach to statutory interpretation that is already authoritative in South Africa. It is therefore presumed that section 80A(c)(ii) will, at best, reinforce the case for applying a modern approach to statutory interpretation in South Africa. Such an intention on the part of the legislator, it is submitted, is however redundant in the light of the Constitution which is regarded as a sovereign authority for applying the modern approach to statutory interpretation. It is therefore submitted that section 80A(c)(ii) is no more than a reaction by the legislator to a perceived, but not real, unwillingness of the courts to look at the context and purpose of a provision.

Although it has been established that section 80A(c)(ii) of the Act, apparently, requires an approach to statutory interpretation that is in conformity to that already followed in South Africa, there remains a presumption towards some ordained purpose for section 80A(c)(ii). A closer inspection of the approach required by the Canadian court when applying section 245(4) of the Canadian Act, reveals a probable hint as to this speculated purpose. In *Canada Trustco Mortgage Company v Canada*²⁰⁰ the court prescribed a modern approach to statutory interpretation in order to 'find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act'. The terms 'object', and 'purpose' are analogous to a modern approach to statutory interpretation. Reference to the 'spirit' of a provision, however, deviates from it. Does this imply that the court must look for some spiritual meaning within a provision i.e. a thing apart of its language? This is the issue addressed in chapter 9.

²⁰⁰ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54 at paragraph 47

CHAPTER 9

Section 80A(c)(ii) of the Act and the ‘spirit of the law’

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CHAPTER 9

Section 80A(c)(ii) of the Act and the 'spirit of the law'

9.1 Introduction

Section 245(4) of the Canadian Act requires a modern approach to statutory interpretation. Such an approach, it was established, is already present in South Africa. When applying section 245(4), however, the Canadian court necessitates that the modern approach be applied in order to 'find the meaning that harmonizes the wording, object, spirit and purpose of the provisions of the Income Tax Act.'²⁰¹ Although the terms 'object' and 'purpose' is not foreign to the modern approach, reference to the 'spirit' of the provision (in South Africa at least²⁰²) might possibly be.

As it is presumed that section 80A(c)(ii) of the Act will require a similar approach to that required by section 245(4) of the Canadian Act, this could have far reaching (if not objectionable) implications to statutory interpretation in South Africa as it begs the following question:

'Is the provision [section 80A(c)(ii)] in fact an injunction to the court to look for some inner and spiritual meaning within the legislation that would not become apparent on a normal purposive approach? Or is it merely a judicious reminder to the judiciary that in applying the law they must not forget to look for absurdity, ambiguity and purpose (as they already should, in any event)?'²⁰³

It is therefore necessary to determine the Canadian position with regards to the 'spirit' of a provision and the proposed effect thereof on their approach to statutory interpretation. The South African position will then be examined to

²⁰¹ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 47

²⁰² 'The spirit of the law does not operate beyond the limits of its language.' (Watermeyer JA in CCE v Randles Brothers and Hudson Ltd 33 SATC 48 at page 66).

²⁰³ Clegg 2007:37

establish exactly where our law stands in this regard. The position in both jurisdictions will then be compared to identify any discrepancies. Discrepancies may reveal some rationale (or not) for the insertion of section 80A(c)(ii) i.e. it may impute some operational function (or not) on section 80A(c)(ii) with regards to statutory interpretation.²⁰⁴ The object in view is thus to determine if section 80A(c)(ii) in fact does contribute something to statutory interpretation in our law.

9.2 Opinion of tax scholars in South Africa

The plausibility of section 80A(c)(ii) of the Act serving as a statutory authority that requires a court to look for some spiritual meaning within a provision, when interpreting statutes, will be evaluated. For this purpose, the opinion of two tax scholars will be examined.

9.2.1 De Koker

An approach to statutory interpretation that involves adhering to the spirit of the law is opposed by De Koker:

‘The principle is clear: at best, a contextual and purposive approach in order to find a meaning that harmonizes the object, spirit and purpose of the provisions of the Income Tax Act does not fit well into South African fiscal jurisprudence; at worst, the application of such an approach is impermissible.’²⁰⁵

²⁰⁴ For instance, if it is found that section 245(4) requires the court to look for some spiritual meaning beyond that obtainable from a normal purposive theory to statutory interpretation, and it is found that such an approach is not operative in South Africa, this could imply that section 80A(c)(ii), as it is presumed that it requires an approach similar to that followed by the Canadian court when applying section 245(4), does in fact add something to statutory interpretation in South Africa.

²⁰⁵ De Koker 2007:19.7

De Koker is of opinion that such an 'extension' of the modern approach is not plausible in the South African jurisprudence.

9.2.2 Cilliers

An approach to statutory interpretation that engages in a search for the meaning of a provision beyond the limits of its language is strongly contested by Cilliers:

'Perhaps only the unfortunate reference to 'spirit' could be seen as problematic. In our law it is dangerous, and in some sense even wrong, to speak of the 'spirit' behind a piece of legislation. This is because the word is typically used to indicate something quite vague, something that is not synonymous with what might be called the purpose of a provision, but rather goes beyond it. The objection to using the word 'spirit' in this sense is that it tends to make one forget that 'the spirit of the law does not operate beyond the limits of its language...'.²⁰⁶

Cilliers is of view that an approach to statutory interpretation that seeks the 'spirit' behind a provision is not plausible in South Africa.

9.2.3 Conclusion

According to De Koker and Cilliers ascertaining the 'spirit' of a provision does not fit well into the South African jurisprudence. If section 80A(c)(ii) of the Act was to adopt such an approach it could be, so it is argued, potentially dangerous, if not impermissible.

9.3 Spirit of the law

The position of the Canadian courts with regard to the 'spirit' of a provision will be examined. Attention is then shifted to the position in South Africa with

²⁰⁶ Cilliers 2008b:108

regards to the 'spirit of the law'. The approach in both jurisdictions will then be compared in order to reveal any differences.

9.3.1 The Canadian position

The Canadian court indicated that there is no 'overriding policy' to be found in the Act, beyond that which can be discerned from its individual provisions, given a proper textual, contextual and purposive interpretation:

'The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue.'²⁰⁷

Cilliers, when he analyzes the phrase 'to find the meaning that harmonizes the wording, object, spirit and purpose of the provision'²⁰⁸, makes the following statement:

'However, this kind of impermissible reference to a so-called 'spirit' behind the legislation is apparently not what was intended in the above quotation, where, it seems, 'spirit' has no sinister meaning. It seems that the word must simply be read *eius dem generis* with 'object' and 'purpose'.²⁰⁹

It is submitted, that the reference to the word 'spirit', as it appears in the cited dictum²¹⁰, is synonymous with 'object' or 'purpose'. Authority for this view is also found in the judgment of OSFC Holdings Ltd v The Queen²¹¹, where the court stated the following at paragraph 66:

²⁰⁷ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 41-42

²⁰⁸ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 47

²⁰⁹ Cilliers 2008b:108

²¹⁰ 'to find the meaning that harmonizes the wording, object, spirit and purpose of the provision'

²¹¹ OSFC Holdings Ltd v R 2001 FCA 260

‘The approach to determine misuse or abuse has been variously described as purposive, object and spirit, scheme or policy. I will refer to these terms collectively as policy of the provisions in question...’

By referring to the terms ‘purposive’, ‘object’, ‘spirit’ and ‘scheme’ collectively as ‘policy’ the impression is created that these terms may indeed be regarded as synonyms to one another, in the Canadian jurisprudence.

9.3.2 The South African position

A recognized principle in South Africa, with regards to the interpretation of statutes, is that the spirit of the law cannot operate beyond the limits of its language. This principle was laid down by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council*²¹² at page 544:

‘There are expressions in these texts which lend some colour to the view that the spirit or intent of a law may be regarded as a thing apart from its language and capable, if infringed, of invalidating a transaction which, prior at any rate to *Madrassa Anjuman Islamia v Johannesburg Council*, has not been adopted by the South African Courts. I know of no case in which the unexpressed intention of the lawgiver has been clothed with authority to affect a transaction which could not under ordinary rules of construction be brought within the written statute.’

This implies that a court cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what it may think to be the policy or object of the particular measure.²¹³

²¹² *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530

²¹³ Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at page 543

9.3.3 A comparison between the Canadian position and the South African position

The position in South Africa and Canada, with regards to the ‘spirit’ of a provision in the context of statutory interpretation, will be compared in order to identify any discrepancies. This will be accomplished by comparing the relevant section in *Canada Trustco Mortgage Company v Canada*²¹⁴ with that of its peer in *Dadoo Ltd v Krugersdorp Municipal Council*²¹⁵. Both these cases are regarded as pioneers, in their respective jurisdictions, with regards to statutory interpretation.

Table 9.1 Comparison between Canada Trustco Mortgage Company v Canada and Dadoo Ltd v Krugersdorp Municipal Council

Canada Trustco Mortgage Company v Canada	Dadoo Ltd v Krugersdorp Municipal Council
<p>‘The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the role of reviewing judges. The Income Tax Act is a compendium of highly detailed and often complex provisions. To send the court on the search for some overarching policy and then to use such a policy to override the</p>	<p>‘Now it has already been pointed out that in interpreting a statute a court is entitled to have regard not only to the words used by the Legislature but also to its object and policy. But clearly more than that is embraced in these two <i>leges</i>. Indeed, at first sight it would almost appear as if it were intended to lay down that a court may construe a statute so extensively as to declare invalid an act which, though it did not contravene the</p>

²¹⁴ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54

²¹⁵ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530

<p>wording of the provisions of the Income Tax Act would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped...²¹⁶</p>	<p>prohibition of the law, nevertheless did violence to its spirit and intent. If that were the correct meaning of these two <i>leges</i> it would in effect enable a court of justice to legislate by supplying what is conceived to be omissions of the Legislature. Such an authority, however, has never, so far as I know, been claimed by the courts of this country ...²¹⁷</p>
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There seems to be harmony between the approach in Canada and South Africa with regards to the role of reviewing judges: a judge has the role to interpret, not to legislate. See Table 9.1. It is thus impermissible in both jurisdictions for a judge to search for an ‘overriding policy’ (in the Canadian jurisdiction) or the ‘spirit’ (in the South African jurisdiction) of a provision when interpreting statutes.

9.3.4 Conclusion

The approach with regards to the ‘spirit of a law’ in South Africa, it is submitted, is in agreement with the approach followed in Canada with regards to an ‘overriding policy’. Both jurisdictions do not allow the court to place a meaning on the language of a provision which it is not reasonably capable of bearing in order to give effect to a presumed policy.

²¹⁶ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 41-42

²¹⁷ Solomon JA in Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at page 558

9.4 Conclusion

In South Africa it is an established rule of statutory interpretation that the spirit of the law cannot operate beyond the limits of its language. This canon is in accord with that followed in Canada where the court indicated that it is impermissible to search for an overriding policy of the provisions of the Act.

Reference to the word 'spirit' by the court in *Canada Trustco Mortgage Company v Canada*²¹⁸, it is submitted, must therefore be read *eius dem generis* with 'object' and 'purpose'. It therefore does not extend the modern approach to statutory interpretation which is required by the application of section 245(4) of the Canadian Act.

This implies that section 80A(c)(ii) of the Act, if the approach required by section 245(4) of the Canadian Act is adopted, will not require the court 'to look for some inner and spiritual meaning within the legislation that would not become apparent on a normal purposive approach' to statutory interpretation. Such an approach is in accord with that endorsed by both De Koker and Cilliers.

An additional rationale for the insertion of section 80A(c)(ii) of the Act could therefore not be identified in this chapter. Section 80A(c)(ii) requires, it is submitted, a modern approach to statutory interpretation which was already authoritative prior to its enactment. The conclusion reached in chapter 8 is thus still maintained: section 80A(c)(ii), presumably, does not contribute anything to our law.

Although it was found that section 80A(c)(ii) would in all probability not add anything to our law, it is still a prerequisite for the application of the GAAR. In order for section 80A(c)(ii) to be satisfied there must be proof of a 'misuse or abuse' of the provisions of the Act or Part IIA. The next chapter will determine on whom the burden of proof lies with regards to abusive tax avoidance.

²¹⁸ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54 at paragraph 47

CHAPTER 10
Burden of proof with regards to section 80A(c)(ii) of the Act

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CHAPTER 10

Burden of proof with regards to section 80A(c)(ii) of the Act

10.1 Introduction

Section 80A(c)(ii) of the Act fails to mention on whom the burden of proof lies with regards to abusive tax avoidance.²¹⁹ This is a controversial issue in our law:

- Section 82 of the Act places the onus on a taxpayer to show, *inter alia*, that any amount is not liable to tax.
- In CIR v Conhage²²⁰, however, the court held that since section 82 dealt with the onus of proof in general terms, the special presumption in section 103(4) would have been redundant if section 82 was meant to apply to section 103 in general.²²¹

As section 103(1) has been abandoned, the authority of CIR v Conhage²²², it is submitted, might be in jeopardy. This chapter will therefore attempt to establish on whom the burden of proof rests with regards to a misuse or abuse of the provisions of the Act, including the provisions of Part IIA. In answering this question the jurisdiction in Canada will be examined in combination with the opinion of tax scholars in South Africa.

²¹⁹ I.e. does section 80A(c)(ii) place the burden of proof on the Commissioner (to convince the court that a provision has been misused or abused) or on the taxpayer (to confirm that a provision has not been misused or abused)?

²²⁰ CIR v Conhage Pty Ltd 61 SATC 391

²²¹ Clegg & Stretch 2007:26.3.3

²²² CIR v Conhage Pty Ltd 61 SATC 391

10.2 Approach in Canada

In *Canada Trustco Mortgage Company v Canada*²²³ consideration was given to the issue of burden of proof. The court decided that once the taxpayer has shown compliance with the wording of a provision, it should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision. The practical burden of showing that there was abusive tax avoidance, it was held, lies on the Minister. It is for him to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner. The court justified this approach by stating that the Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.

10.3 The opinion of various tax scholars in South Africa

10.3.1 Meyerowitz

When discussing the onus of proof, with regards to section 80A(c)(ii) of the Act, Meyerowitz makes the following statement:

‘With respect it is also our view that although section 82 of our Act cast the onus upon the taxpayer to prove the assessment to be wrong he will have discharged this onus if the Court accepts that the requirements of section 80A (other than the misuse or abuse provisions) are not met, and it is then for the *fiscus* to convince the court that the taxpayer has misused or abused the relevant provisions.’²²⁴

Meyerowitz thus favours that the burden of proof be placed on the Commissioner.

²²³ *Canada Trustco Mortgage Company v Canada* 2005 SSC 54 at paragraph 65 and 69

²²⁴ Meyerowitz et al 2007:160

10.3.2 Cilliers

With regards to the onus of proof, in the context of section 80A(c)(ii) of the Act, Cilliers makes the following statement:

‘A tax-avoider’s goal is always primarily to secure an advantage for himself, even if his action should happen to be accompanied by an attitude of insouciance or one-upmanship towards the *fiscus*. At any rate, it is submitted, the onus in this regard must rest on the *fiscus*. To place the onus on the taxpayer in this context would be absurd.’²²⁵

Cilliers accordingly supports the case for placing the burden of proof on the Commissioner.

10.3.3 Davis

After indicating that it was incumbent on the Commissioner to establish the facts upon which he had found ‘abnormality’ to exist in *CIR v Conhage (Pty) Ltd*²²⁶, Davis makes the following statement:

‘On the basis of the Conhage case (supra) it would appear that the onus lies on the Commissioner to prove the abnormality, lack of commercial substance or misuse or abuse requirement, notwithstanding s 82.’²²⁷

Davis holds the view that the burden of proof should be placed on the Commissioner.

²²⁵ Cilliers 2008b:104-105

²²⁶ *CIR v Conhage Pty Ltd* 61 SATC 391

²²⁷ Davis et al 2007:80G-1

10.4 Conclusion

According to Meyerowitz, Cilliers and Davis the burden of proof with regards to section 80A(c)(ii) of the Act will rest on the shoulders of the Commissioner. This approach is in accord with that followed in the Canadian jurisprudence and similar to that established in *CIR v Conhage (Pty) Ltd*²²⁸. It is therefore submitted that the practical burden of showing that there was a 'misuse or abuse of the provisions of this Act (including the provisions of this Part)' will be on the Commissioner, notwithstanding section 82 of the Act.

In order to aid taxpayers, and even more so the Commissioner, whom it is alleged must establish a misuse or abuse, it is necessary to refer to some examples illustrating instances in which section 80A(c)(ii) may (presumably) be applied, and others where it may not be applied. This will be illustrated in chapter 11.

²²⁸ *CIR v Conhage Pty Ltd* 61 SATC 391

CHAPTER 11

Examples

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CHAPTER 11

Examples

11.1 Introduction

In an attempt to understand the application of the misuse or abuse rule, which as it will be remembered, is contained in section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act (its proposed root), it is necessary to furnish a few examples. Two of these examples relate to recent Canadian cases:

- Canada Trustco Mortgage Company v Canada²²⁹ in which an abuse was not established; and
- Mathew v Canada²³⁰ in which an abuse was established.

A further two examples²³¹ will illustrate situations in which SARS proposes to apply section 80A(c)(ii):

- Misuse or abuse of section 24J of the Act
- Misuse or abuse of section 6quat of the Act

²²⁹ Canada Trustco Mortgage Company v Canada 2005 SSC 54

²³⁰ Mathew v Canada 2005 SCC 55

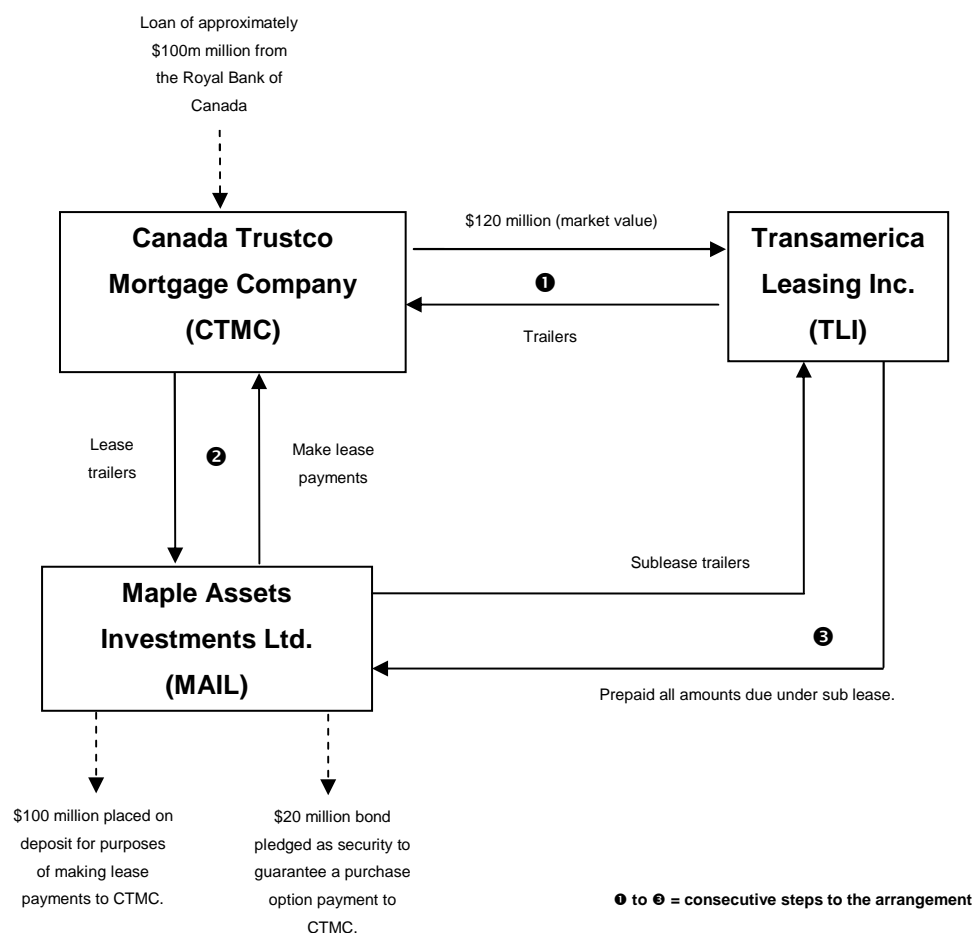
²³¹ These examples relate to the draft version of section 80A(c)(ii) of the Act, which contained the words 'frustrate the purpose of any provision'. The enacted version, however, refers to 'a misuse or abuse of the provisions'. In 3.4 it was argued that the terms 'misuse', 'abuse' and 'frustrate' are synonyms. It was also established that the linguistic nature of the word 'abuse' requires determining whether the purpose of something has been violated. The examples furnished by SARS, it is submitted, is thus still relevant for the enacted version of section 80A(c)(ii) of the Act.

11.2 Canada Trustco Mortgage Company v Canada

Facts

Canada Trustco Mortgage Company ('CTMC'), carries on business as a mortgage lender. As part of its business operations, CTMC enjoyed large revenues from leased assets. With the use of its own money and a loan of approximately \$100 million from the Royal Bank of Canada, CTMC purchased trailers from Transamerica Leasing Inc. ('TLI') at the fair market value of \$120 million. CTMC leased the trailers to Maple Assets Investments Limited ('MAIL') who in turn subleased them to TLI, the original owner. TLI then prepaid all amounts due to MAIL under the sublease. MAIL placed on deposit an amount equal to the loan for purposes of making the lease payments and a bond was pledged as security to guarantee a purchase option payment to CTMC at the end of the lease. See Figure 11.1.

Figure 11.1: Canada Trustco Mortgage Company v Canada



These transactions allowed CTMC to offset revenue from its leased assets by claiming a considerable Capital Cost Allowance (CCA) on the trailers, whilst substantially minimizing its financial risk.²³²

The appellant (Canada) submitted that the transaction involved no real risk and that CTMC thus did not actually spend \$120 million to purchase the trailers from TLI. In the appellant's view, CTMC created a cost for CCA purposes that is an illusion without incurring any real expense. This, the appellant argued, contravened the object and spirit of the CCA provisions and constituted abusive tax avoidance within section 245(4) of the Canadian Act.²³³

Interpretation

The court came to the conclusion that there was no abusive tax avoidance present under section 245(4) of the Canadian Act:

'The appellant suggests that the usual result of the CCA provisions of the Act should be overridden in the absence of real financial risk or 'economic cost' in the transaction. However, this suggestion distorts the purpose of the CCA provisions by reducing them to apply only when sums of money are at economic risk. The applicable CCA provisions of the Act do not refer to economic risk. They refer only to 'cost'. ... We see nothing in the GAAR or the object of the CCA provisions that permits us to rewrite them to interpret 'cost' to mean 'amount economically at risk' in the applicable provisions. To do so would be to invite inconsistent results.'²³⁴

²³² Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 3

²³³ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 69

²³⁴ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 75

The court also noted that a narrow consideration of the 'economic substance' of the transaction, viewed in isolation from a textual, contextual and purposive interpretation of the CCA provisions, has very little meaning:

'... the application of the GAAR is a complex matter of statutory interpretation in which the object, spirit and purpose of the provisions giving rise to the tax benefit are assessed in light of the requirements and wording of the GAAR. While the 'economic substance' of the transaction may be relevant at various stages of the analysis, this expression has little meaning in isolation from the proper interpretation of specific provisions of the Act.'²³⁵

In essence the court applied a modern approach to statutory interpretation upon which it came to the conclusion that it would be wrong to confine the meaning of 'cost' to 'amount economically at risk'. Such an interpretation, the court stated would be inconsistent with the object and purpose of the CCA provisions.

The court also acknowledged the fact that the economic or commercial substance of a transaction is relevant in the misuse or abuse analysis, but warned that this characteristic, considered in isolation from the proper interpretation of the specific provisions of the Act, has little meaning. The modern approach was thus held to be decisive.

11.3 Mathew v Canada

Facts

The Standard Trust Company (STC) carried on a business which included the lending of money on the security of mortgages on real property. STC became insolvent and a liquidator was appointed. At that time STC owned a portfolio of 17 non-performing loans with 9 underlying real estate properties having a

²³⁵ Canada Trustco Mortgage Company v Canada 2005 SSC 54 at paragraph 76

fair market value of approximately \$33 million. The cost to STC of the 'Portfolio Assets' was approximately \$85 million.²³⁶

Since STC was being liquidated, it could not use the approximately \$52 million in unrealized losses from the Portfolio Assets. The liquidator devised and oversaw the execution of a series of transactions to realize maximum returns on the disposal of the Portfolio Assets. The overall arrangement involved three stages.

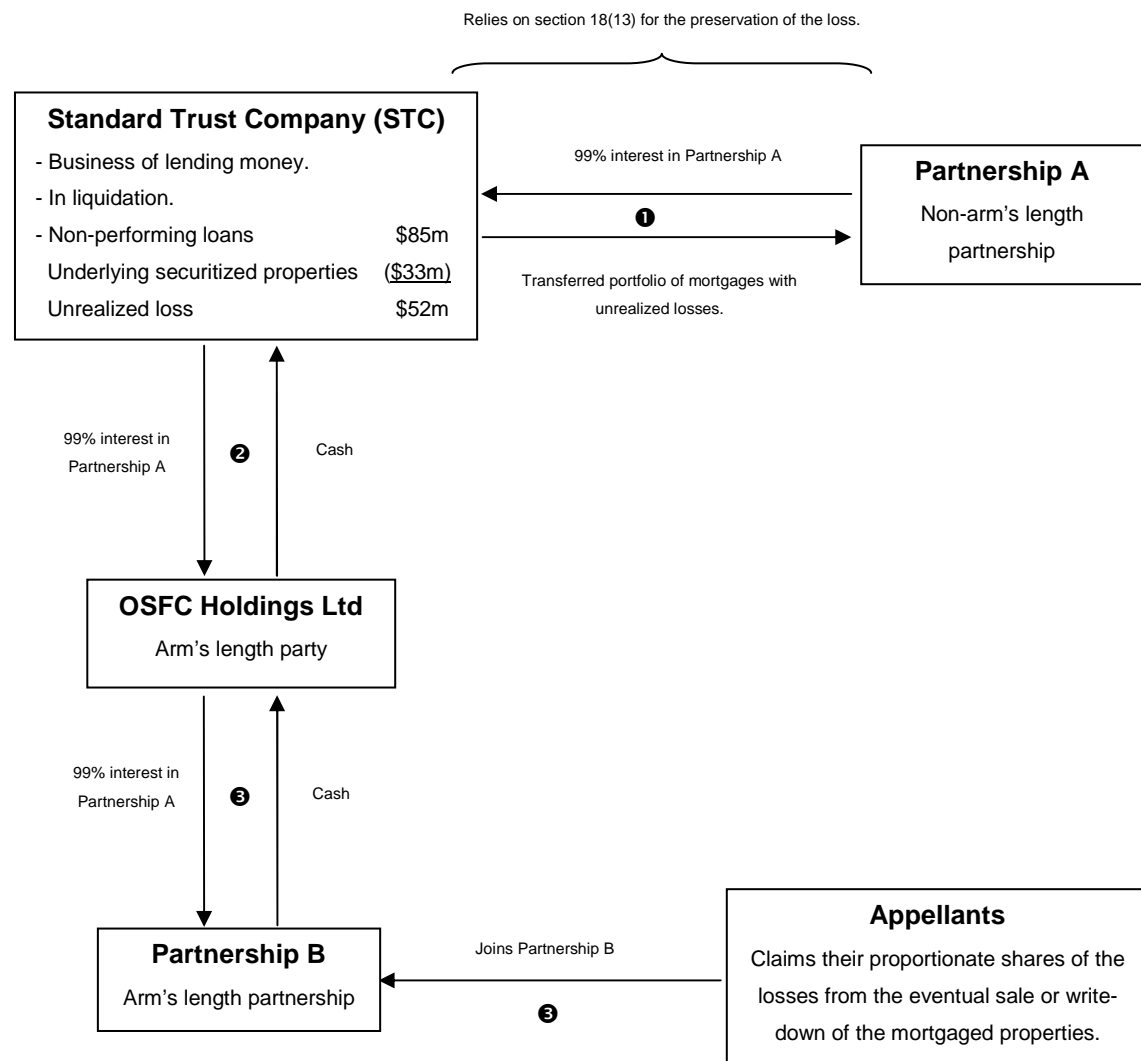
- At the first stage, STC transferred a portfolio of mortgages with unrealized losses to a non-arm's length partnership, Partnership A, thereby acquiring a 99 percent interest in it.
- At the second stage, STC relied on section 18(13) of the Canadian Act to transfer the unrealized losses to Partnership A and then sold its 99 percent interest in it to an arm's length party, OSFC Holdings Ltd.
- At the third stage, Partnership B was formed to acquire the 99 percent interest in Partnership A. The appellant taxpayers then joined Partnership B and claimed their proportionate shares of the losses from the eventual sale or write-down of the mortgaged properties.²³⁷

This scheme is illustrated by Figure 11.2. Relying on a combination of section 18(13) and the partnership provisions of the Canadian Act, the taxpayers deducted over \$10 million of STC's losses against their own incomes.

²³⁶ Mathew v Canada 2005 SCC 55 at paragraph 4

²³⁷ Mathew v Canada 2005 SCC 55 at paragraph 3

Figure 11.2: Mathew v Canada



Section 18(13) of the Canadian Act reads as follows:

‘Subject to subsection 138 and notwithstanding any other provision of this Act, where a taxpayer

- (a) who was a **resident of Canada** at any time in a taxation year and whose **ordinary business during that year included the lending of money**, or
- (b) who at any time in the year carried on a business of lending money in Canada

has **sustained a loss on a disposition of property** used or held in that business **that is a share, or a loan**, bond, debenture, mortgage, note, agreement of sale or any other indebtedness, other than a property that is a capital property of the taxpayer, **no amount shall be deducted** in computing the income of the taxpayer from that business for the year **in respect of the loss where**

- (c) during the period commencing 30 days before and ending 30 days after the disposition, the taxpayer or a person or **partnership that does not deal at arm's length with the taxpayer acquired** or agreed to acquire the same or identical **property** (in this subsection referred to as the 'substituted property'), **and**
- (d) at the end of the period described in paragraph (c), the taxpayer, person or partnership, as the case may be, owned or had a right to acquire the substituted property, and any such **loss shall be added in computing the cost to the taxpayer, person or partnership**, as the case may be, of the substituted property.²³⁸

The appellants, who ultimately claimed the losses, sought to rely in part on the loss-preservation aspect of section 18(13)(d). They argued that all the conditions under section 18(13) were met and that in particular, since Partnership A did not deal at arm's length with STC at the end of the period prescribed, the unrealized losses were properly transferred to Partnership A. Further, so they argued, once the losses were preserved for the benefit of Partnership A under section 18(13), they were entitled to claim losses in proportion to their interest in Partnership B, under the partnership provisions.²³⁹

²³⁸ The words in bold indicate the relevant provisions to the stated case.

²³⁹ Mathew v Canada 2005 SCC 55 at paragraph 39

Interpretation

The court came to the conclusion that to use section 18(13), in combination with the partnership rules, in order to preserve and transfer a loss to be realized by a taxpayer who deals at arm's length, results in abusive tax avoidance under section 245(4):

'Interpreted textually, contextually and purposively, s. 18(3) and s. 96 [partnership provisions] do not permit arm's length parties to purchase the tax losses preserved by s. 18(3) and claim them as their own. The purpose of s. 18(13) is to transfer a loss to a non-arm's length party in order to prevent a taxpayer who carries on a business of lending money from realizing a superficial loss. The purpose for the broad treatment of loss sharing between partners is to promote an organizational structure that allows partners to carry on a business in common, in a non-arm's length relationship. Section 18(13) preserves and transfers a loss under the assumption that it will be realized by a taxpayer who does not deal at arm's length with the transferor. Parliament could not have intended that the combined effect of the partnership rules and s. 18(13) would preserve and transfer a loss to be realized by a taxpayer who deals at arm's length with the transferor. To use these provisions to preserve and sell an unrealized loss to an arm's length party results in abusive tax avoidance under s. 245(4). Such transactions do not fall within the spirit and purpose of s. 18(13) and s. 96, properly construed. The appellants' submission that nothing in s. 18(13) limits subsequent dispositions of the property at arm's length parties depends on a literal interpretation of the section and fails to address the main inquiry under the GAAR, which rests on a contextual and purposive interpretation of the provisions at issue.'²⁴⁰

²⁴⁰ Mathew v Canada 2005 SCC 55 at paragraph 58-59

The court thus applied the modern approach to statutory interpretation and came to the conclusion that the transaction in question resulted in a misuse or abuse of the purpose which the provisions under dispute seek to achieve.

11.4 Misuse or abuse of section 24J of the Act²⁴¹

Facts

Section 24J provides for a synchronisation between the time when expenditure in the form of interest is incurred, for the purpose of determining the deduction allowable under section 11(a), and the time when that interest accrues to its recipient.²⁴² It is applicable to an issuer in relation to an 'instrument'²⁴³ (as defined) and a holder in relation to an 'income instrument'²⁴⁴ (as defined).

Parties A and B, whom are both companies, intend to enter into a repurchase agreement in respect of certain securities. A 'repurchase agreement' is defined as follows in section 24J(1):

"repurchase agreement' means the obtaining of money (which money shall for the purposes of this section be deemed to have been so obtained by way of a loan) through the disposal of an asset by any person to any other person **subject to an agreement in terms of which such person undertakes to acquire from such other person at a future date the asset so disposed of** or any other asset issued by the issuer of, and which has been so issued subject to the same condition regarding term, interest rate and price as, the asset so disposed of;²⁴⁵

²⁴¹ South African Revenue Services 2006:16-17

²⁴² Meyerowitz 2007:13.40

²⁴³ Section 24J(2)

²⁴⁴ Section 24J(3)

²⁴⁵ The words in bold indicate the part that the taxpayers, in this example, contemplate in circumventing.

A 'repurchase agreement' satisfies both the definition of an 'instrument' and an 'income instrument' in the case of a company. In order to avoid the provisions of section 24J, parties A and B substitute married put²⁴⁶ and call options²⁴⁷ for the portion of the agreement requiring the repurchase of the securities at the conclusion of the arrangement. The strike price both for the put and the call is identical.

The parties take the position that their arrangement falls outside the statutory definition of a repurchase agreement since the married put and call, taken literally, give them the right, but not the obligation, to repurchase the securities. Section 24J is therefore not applicable.

Since the strike price for the put and call in this example is the same, the arrangement ensures that one of the options will be executed and that the underlying securities will be reacquired by the original owner despite the absence of a technical legal obligation to do so.

Interpretation

SARS furnishes the following rationale for applying section 80A(c)(ii) in this example:

'Under the circumstances, if the parties' position were to be accepted, the avoidance arrangement would *frustrate the purpose of section 24J* by permitting interest attributable to an instrument to be taxed on other than the yield to maturity basis.' (Emphasis added.)

The purpose of section 24J, so it is argued, is violated by the proposed transaction and therefore section 80A(c)(ii) may be applied. A purposive

²⁴⁶ A put option is the right to sell the underlying investment at a predetermined price up to or on a specific date (Goodall 2007:10.2).

²⁴⁷ A call option is the right to buy the underlying asset at a specific price up to or on a specific date (Goodall 2007:10.2).

theory to the interpretation of section 24J is thus implied. SARS hence envisages a modern approach to statutory interpretation when applying section 80A(c)(ii).

11.5 Misuse or abuse of section 6quat of the Act²⁴⁸

Facts

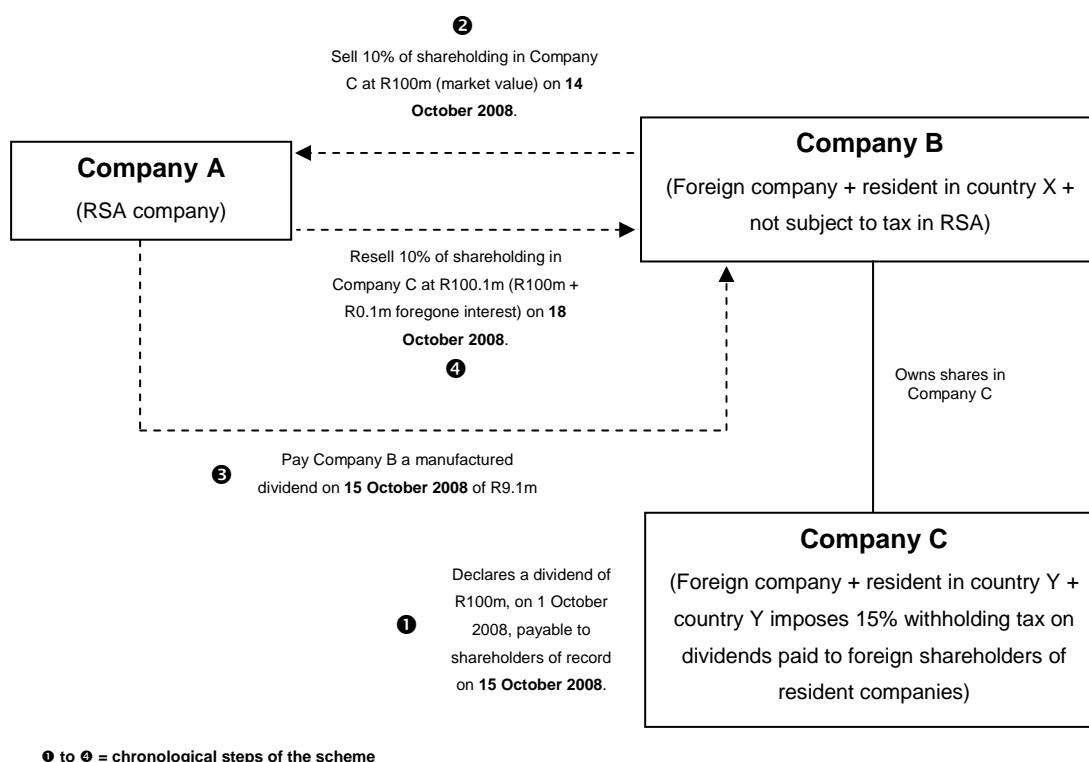
Company A is a South African company. Company B is a foreign company, resident in country X, and is not subject to tax in South Africa. Company B owns shares in another foreign company, Company C, that is resident in Country Y. Country Y imposes a 15% withholding tax on dividends paid to foreign shareholders of resident companies. The market value of the Company C shares is R1000 million. On 1 October 2008 Company C declares a dividend of R100 million, payable to shareholders of record on 15 October 2008.

Promotor P approaches Company A with a pre-conceived plan. Company A would enter into a repurchase arrangement with Company B in respect of the Company C equity shares. Pursuant to this repurchase agreement, Company A would acquire 10% of the Company C shares for R100 million on 14 October 2008. It would then resell them to Company B on 18 October 2008 for R100.1 million (R100 000 being equivalent to the interest foregone on R100 million for four days). Company A would also agree to pay Company B a manufactured dividend²⁴⁹ on 15 October 2008 of R9.1 million. Company A also pays Promotor P a fee of R200 000. See Figure 11.3.

²⁴⁸ South African Revenue Services 2006:17-18

²⁴⁹ Security lending arrangements normally provide that the borrower shall pay to the lender a 'manufactured dividend' in stead of any dividends declared in respect of the security borrowed from the lender. Any payment made by the borrower to the lender as a 'manufactured dividend' is not a dividend for Income Tax purposes and must not be treated as a dividend by either the lender or the borrower. The 'manufactured dividend' will constitute gross income in the hands of the lender and will not qualify for the exemption in terms of section 10(1)(k). The person who is responsible for the payment of

Figure 11.3: Misuse or abuse of section 6quat of the Act



If this scheme is accepted, at face value, Company A would only report taxable income from the foreign dividend of R900 000. It would also claim a foreign tax rebate of R1.5 million, equal to the full amount of the withholding tax imposed by country Y. As a result of this approach, Company A would incur South African income tax of only R252 000, but would claim a foreign tax rebate of R1.5 million, thereby avoiding R1.248 million of South African income tax on other income:

Foreign dividend received	R10 000 000
Manufactured dividend	<u>(R 9 100 000)</u>
Net dividend received	R 900 000
Income tax @ 28%	R 252 000

a 'manufactured dividend' will only be allowed a deduction in the determination of his taxable income of the amount paid, if the amount meets the requirements of section 11(a) of the Income Tax Act (Practice Note: No. 5 – 14 April 1999; Securities Lending Arrangements).

Section 6quat rebate	<u>(R 1 500 000)</u>
Income tax avoided	R 1 248 000

In this arrangement, Company A suffers a negative cash flow and loss of R700 000 before South African tax. After taking the South African income tax avoided into account this changes to a positive cash flow and profit of R548 000.

Profit on sale of shares	R 100 000
Plus dividend received	R10 000 000
Less foreign withholding tax	(R 1 500 000)
Less manufactured dividend	(R 9 100 000)
Less fee paid to Promoter	<u>(R 200 000)</u>
Negative cash flow before tax	(R 700 000)
South African tax avoided	<u>R 1 248 000</u>
Positive cash flow after tax	R 548 000

Interpretation

SARS provides the following reason for applying section 80A(c)(ii) in this example:

‘The purpose of the foreign tax rebate under section 6quat is to provide relief from the double taxation of the same income. In this scheme, Company A, Company B and Promoter P have attempted to manipulate the literal provisions of section 6quat to *produce a result that would frustrate the purpose of those provisions.*’ (Emphasis added.)

Allowing the proposed scheme, so it is contended, would frustrate the purpose of section 6quat of the Act. Reference to the ‘purpose’ of this provision requires a modern approach to statutory interpretation. Here also, it seems that this is what SARS envisaged when enacting section 80A(c)(ii) of the Act.

11.6 Conclusion

The examples confirmed the contention furnished in this study: the modern approach to statutory interpretation is presumably required when applying the misuse or abuse rule, which is contained in section 80A(c)(ii) of the Act and section 245(4) of the Canadian Act.

CHAPTER 12

Conclusion

The misuse or abuse concept was introduced in 1995 by the Katz Commission. It proposed that the concept be inserted as a saving clause, acting as an appropriate line of limitation on the operation of section 103(1). Its function, however, was reversed in the draft version, as well as in the enacted version of section 80A(c)(ii) of the Act: it expands the application of Part IIA.

The words 'frustrate the purpose of any provision' (in the draft version of section 80A(c)(ii) of the Act) was replaced with the words 'misuse or abuse of the provisions' (in the enacted version). It was contented that the concept of a misuse or abuse of a provision goes beyond that of merely frustrating the purpose of a provision. This was due to the former, so it was argued, being a much more vague and incomprehensive inquiry than the latter. However, when the ordinary meaning of the word 'abuse' was construed, it seemed that ascertaining whether the purpose of something was contravened was inherently imbedded in its linguistic nature. An inquiry as to the abuse of a provision, so it was argued, could therefore not go beyond that of frustrating the purpose of a provision.

The latter contention was confirmed when it was established that the words 'misuse or abuse', in Canadian case law, imply 'frustrating' or 'defeating' the purpose of a provision i.e. using a provision for a bad purpose. If therefore, the interpretation of a 'misuse or abuse' in Canadian case law is exactly what was intended by the South African legislature this may imply that the substitution of the phrase 'frustrate the purpose of any provision' (in the draft version of section 80A(c)(ii)) with the phrase 'misuse or abuse of the provisions' (in the enacted version) does not have any significant effect. This, however, is contrary to the presumption that where the legislature uses a different word or expression the strong inference is that this has been done designedly to provide for a different result. The precise meaning of the words

'misuse or abuse' is thus still elusive. This confirms the contention that section 80A(c)(ii) is an ambiguous provision.

Section 80A(c)(ii) of the Act requires an objective evaluation. This is yielded by the words 'it would result in'. By employing the words 'directly or indirectly' the legislature captures both the situations where the connection between an avoidance arrangement and the misuse or abuse of a provision is direct and remote. The application of section 80A(c)(ii) is limited to the provisions of the Act, which includes Part IIA.

Section 80A(c)(ii) of the Act derives (in part at least) from the Canadian GAAR contained in section 245 of the Canadian Act. The misuse or abuse concept, contained in section 245(4) thereof, however, draws on the doctrine of 'abuse of law' which applies in some European jurisdictions. The research was however confined to section 245(4) of the Canadian Act.

A comparison between section 245(4) of the Canadian Act and section 80A(c)(ii) of the Act revealed a fundamental similarity: both sections contain a misuse or abuse rule, expressed in similar language and set-up, which forms the operative heart thereof. Section 245(4), however, employs the misuse or abuse rule as a line of limitation to section 245 (as it is couched in negative language), whereas section 80A(c)(ii) employs it as an expansion to Part IIA (as it is couched in positive language). Other differences between the two provisions relate to the scope of the misuse or abuse rule and the judicial flexibility the court has when applying it. None of the differences, it was submitted, rendered the presumable application of the misuse or abuse rule, in their respective sections, different from the other. It was therefore argued that section 245(4) of the Canadian Act could be regarded as an appropriate comparative for section 80A(c)(ii) of the Act.

The Supreme Court of Canada indicated that the application of the misuse or abuse rule involves a two-stage analytical process:

- The first stage is to interpret the provisions, relied on by the taxpayer, to determine their object, spirit and purpose. This requires undertaking a contextual and purposive theory to statutory interpretation.
- The second stage is to determine whether the transaction frustrates the identified object, spirit or purpose of those provisions.

Section 245(4) thus obliged the Canadian court to convert from interpreting statutes in a literal manner (the traditional approach) to interpreting statutes in a contextual and purposive manner (the modern approach). Section 245(4), therefore, had the effect of being a statutory interpreting rule in Canada to codify the modern approach.

In South Africa, however, the modern approach to statutory interpretation was already operative prior to the enactment of section 80A(c)(ii) of the Act. If, therefore, the effect sought after by our legislator when enacting this section, was to encourage a modern approach to statutory interpretation (like that of its counterpart in Canada) section 80A(c)(ii) will add nothing to our law. It will merely enshrine an approach to statutory interpretation that is already authoritative in South Africa.

Reference to the 'spirit' of a provision (in the two-stage analytical process applied by the Supreme Court of Canada) requires not that the court must search for some 'overriding policy' of a provision i.e. some inner and spiritual meaning within the legislation that would not become apparent on the application of the modern approach. The South African and Canadian position are thus in accord to one another.

The practical burden of showing that there was abusive tax avoidance, it is proposed, lies on the Commissioner (notwithstanding section 82 of the Act). This approach is in agreement to that followed in the Canadian jurisprudence.

The examples furnished in this research confirmed the conclusion to which the writer has come: section 80A(c)(ii) presumably adds nothing to our law, it

merely requires a modern approach to statutory interpretation which has been applied of old by the South African Courts.

As formerly required, taxpayers and tax consultants, when utilizing the provisions of the Act, should adhere to a modern approach when construing those provisions. Similarly, tax officers, when contemplating the application of section 80A(c)(ii), is obliged to base allegations on a modern approach to statutory interpretation.

It seems therefore that the architects of tax aggressive structures have thus never been permitted to abuse South Africa's tax provisions in ways clearly unintended by the legislation. They have since the mid 1900's, so it appears, been vigorously challenged by the modern approach to statutory interpretation.

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